

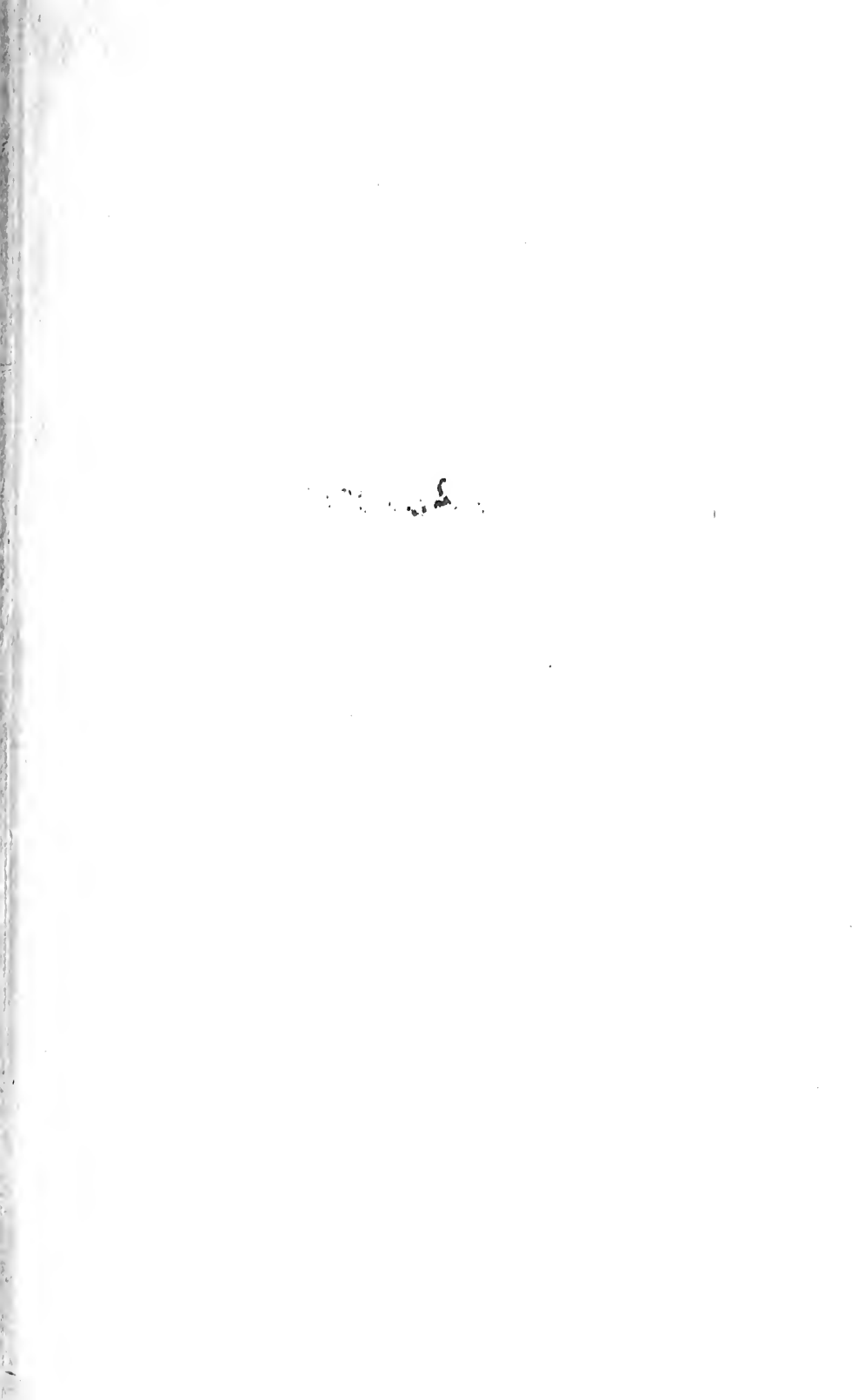
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No. 10925

United States
Circuit Court of Appeals
For the Ninth Circuit.

F. C. MOSER,

Appellant,

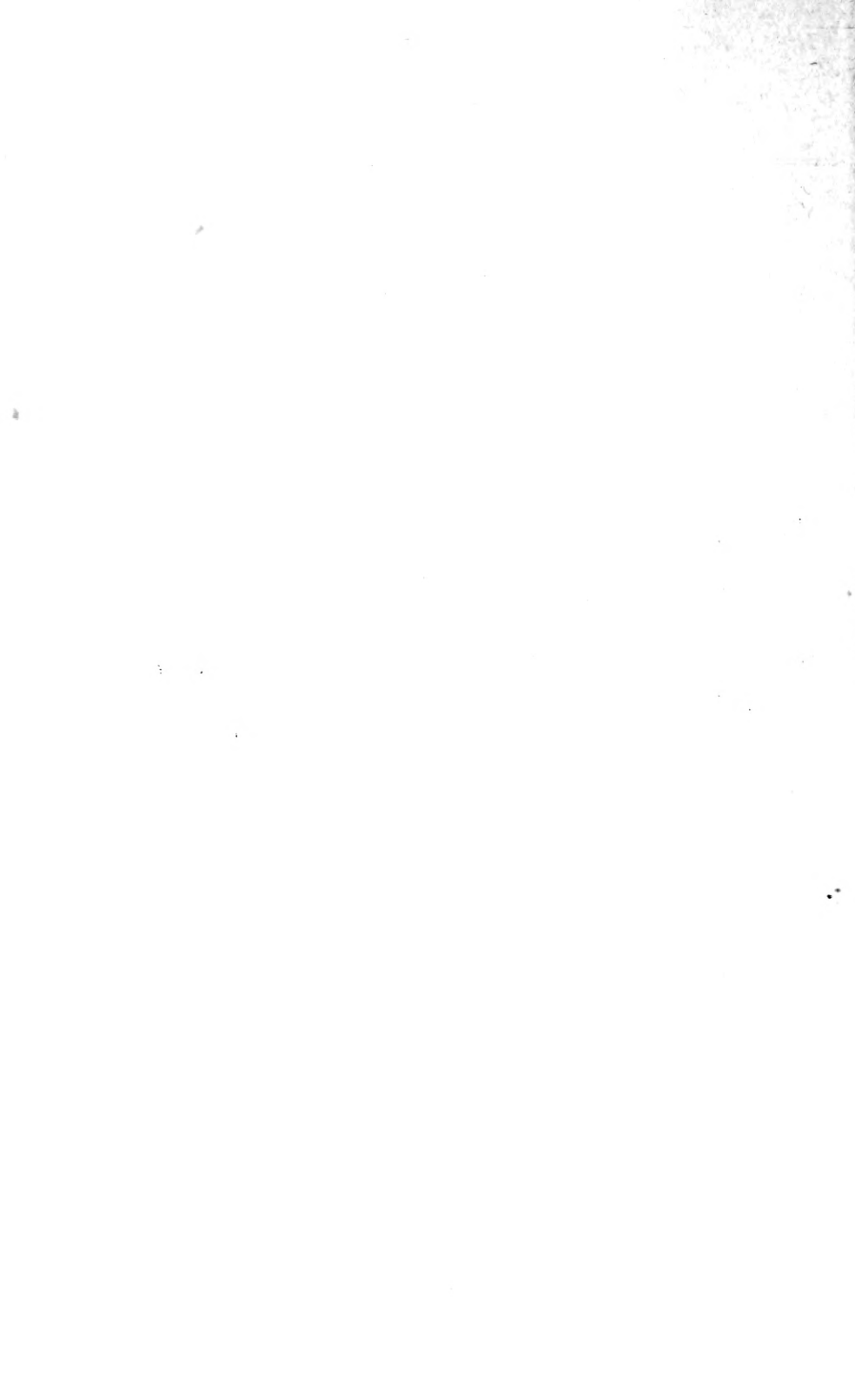
vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

CLARENCE J. COLEMAN

415 First National Bank Building
Everett, Washington

and

CLAYTON BOLLINGER

415 First National Bank Building
Everett, Washington.

Attorneys for Appellant

WRIGHT, INNIS, & SIMON

RAYMOND G. WRIGHT

CLARENCE R. INNIS

ARTHUR E. SIMON

Suite 1020—1411 Fourth Avenue Building
Seattle, Washington

Attorneys for Appellees [*1]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of Washington
In and for the County of King

No. 351225

F. C. MOSER,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Defendant.

PETITION FOR REMOVAL OF ACTION TO
UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASH-
INGTON, NORTHERN DIVISION

To the Honorable Judge of the Superior Court
of the State of Washington, for King County:

Comes now the defendant, New York Life Insurance Company, a corporation, petitioner herein, and appearing specially for the purpose only of petitioning for the removal of the above entitled action to the District Court of the United States for the Western District of Washington, Northern Division, and for no other purpose, respectfully represents and alleges as follows:

I.

That defendant, New York Life Insurance Company, is now and was at all times herein mentioned and at all times mentioned in the complaint of plaintiff, and at the commencement and insti-

tution of the above entitled suit or action, and at the time of the serving and filing of this petition for removal, a mutual insurance corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York, and at all the times mentioned was and now is a citizen and resident of the State of New York and a non-resident of the State of Washington.

II.

That plaintiff, F. C. Moser, is now and was at all [3] times hereinafter mentioned, and at all times mentioned in his complaint, and at the time of the commencement and institution of the above entitled suit or action, and at the time of serving and filing this petition for removal, a citizen and resident of the State of Washington within the Northern Division of the Western District of Washington.

III.

That the above entitled action has been brought and commenced in this court and is now pending therein; that copies of plaintiff's summons and complaint were served upon defendant in King County, Washington, by service upon the Insurance Commissioner of the State of Washington, on February 14, 1944, and that at the time of the service and filing of this petition for removal the time within which defendant is required by the laws of the State of Washington to answer or plead to said complaint has not expired.

IV.

That the above entitled action is a suit of a civil nature; that the cause of action stated in plaintiff's complaint is for damages in the sum of \$47,804.53 alleged to have been sustained by plaintiff by reason of alleged false and fraudulent representations of defendant in respect of renewal commissions payable to plaintiff on certain policies of life insurance issued upon applications therefor which plaintiff alleges he secured; and that the matter in controversy and the amount involved in said action and the value of the objects sought by plaintiff in said action exceed the sum of \$3,000.00 exclusive of interest and costs.

V.

That at the date of the commencement of the above entitled action and ever since and now said suit and the entire controversy therein was and still is between citizens [4] and residents of different states, namely, between F. C. Moser, a resident and citizen of the State of Washington, as plaintiff, and New York Life Insurance Company, a corporation created and existing under the laws of the State of New York, as defendant, which corporation is a non-resident and is not a citizen of the State of Washington.

VI.

That defendant presents herewith a good and sufficient bond in the penal sum of One Thousand Dollars (\$1,000.00), as provided by law, and conditioned that defendant will enter in the United

States District Court for the Western District of Washington, Northern Division, within thirty days from the filing of this petition, a certified copy of the record in this suit or action, and further conditioned for the payment of all costs that may be awarded by said District Court if the said District Court of the United States shall determine and hold that this suit or action was improperly or wrongfully removed thereto.

Wherefore, petitioner prays that this Honorable Court proceed no further herein except to accept this petition, to accept and approve the said surety and bond presented herewith, to order the removal of the suit or action to the United States District Court for the Western District of Washington, Northern Division, and to direct that a certified copy of the record herein be made by the Clerk of this Court for filing in said District Court, as provided by law.

RAYMOND G. WRIGHT
(CLARENCE R. INNIS
ARTHUR E. SIMON

Attorneys appearing specially
for New York Life Insurance
Company, defendant

Office and Post-Office Address:

1020 - 1411 Fourth Avenue Building,
Seattle, Washington [5]

State of Washington,
County of King—ss.

Clarence R. Innis, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof and that each and every matter and thing therein stated is true; that he makes this verification on behalf of said petitioner because said petitioner is a non-resident of the State of Washington and there are no officers of said petitioner therein.

CLARENCE R. INNIS

Subscribed and sworn to before me this 1st day of March, 1944.

(Notary Seal) LURIE DOROTHY

Notary Public in and for the State of Washington,
residing at Seattle

Filed in King County Clerk's Office Mar. 6, 1944.

[Endorsed]: Filed in the United States District Court Apr. 4, 1944. [6]

[Title of Superior Court and Cause.]

NOTICE OF REMOVAL

To: The above named plaintiff, F. C. Moser, and to
J. C. Bolinger and Clarence J. Coleman, his
attorneys:

You, and each of you are hereby notified that New York Life Insurance Company, appearing specially for the purpose of presenting its petition to the above entitled court for the removal of the above entitled cause to the District Court of the United States for the Western District of Washington, Northern Division, will file its petition and bond for such removal in said Superior Court on the 6th day of March, 1944, and at ten o'clock in the forenoon of said day or as soon thereafter as counsel can be heard, will present the same to the Presiding Judge of the said Superior Court at his court room in the City of Seattle, or to such other judge of said court to whom said petition may, by said Presiding Judge, be transferred or assigned, and apply for an order accepting said petition and bond and directing the removal of the above entitled cause to the District Court of the United States for the Western District of Washington, Northern Division.

A copy of said petition and of the said bond are herewith served upon you. [7]

Dated this 1st day of March, 1944.

RAYMOND G. WRIGHT
CLARENCE R. INNIS
ARTHUR E. SIMON

Attorneys for Petitioner, New York Life Insurance Company, appearing specially and only for the purpose of removal.

Receipt of a copy of the foregoing notice and copies of said petition and said bond is hereby acknowledged this day of 1944.

.....
.....

Attorneys for Plaintiff.

Filed in County Clerk's Office Mar. 6, 1944.

[Endorsed]: Filed in the United States District Court Apr. 4, 1944. [8]



[Title of Superior Court and Cause.]

REMOVAL BOND

Know All Men By These Presents:

That we, New York Life Insurance Company, a corporation, as Principal, and the Indemnity Insurance Company of North America, as Surety, are held and firmly bound unto F. C. Moser, plaintiff in the above entitled action, in the penal sum of One Thousand Dollars (\$1000.00), lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves,

our respective successors and assigns, jointly and severally, firmly by these presents.

Upon Condition, Nevertheless, That

Whereas, the said New York Life Insurance Company, a corporation, defendant herein, has petitioned the Superior Court of the State of Washington, in and for King County, for the removal of the above entitled cause therein pending, wherein the said F. C. Moser is the plaintiff and the said New York Life Insurance Company, a corporation, is defendant, to the United States District Court for the Western District of Washington, Northern Division,

Now, if the said New York Life Insurance Company, a corporation, shall enter into the said United States District Court for the Western District of Washington, Northern Division, within thirty (30) days from the date of filing said petition, a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said United States District Court, if said Court shall [9] hold that this suit is wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals this 1st day of March,
1944.

NEW YORK LIFE INSUR-
ANCE COMPANY,

a corporation

By RAYMOND G. WRIGHT
CLARENCE R. INNIS
ARTHUR E. SIMON

Its Attorneys

INDEMNITY INSURANCE
COMPANY OF NORTH
AMERICA

[Seal] By T. A. HILL

Its Attorney-in-fact.

Filed in County Clerk's Office Mar. 6, 1944.

[Endorsed]: Filed in the United States District
Court Apr. 4, 1944. [10]

[Title of Superior Court and Cause.]

ORDER ACCEPTING PETITION AND BOND
AND DIRECTING REMOVAL OF CAUSE
TO UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

It appearing to the satisfaction of this court that
New York Life Insurance Company, a corporation,
named as defendant in the above entitled action, has
this day filed its petition for removal of this cause
to the United States District Court for the Western
District of Washington, Northern Division, in ac-

cordance with the statute therefor provided; and that said defendant has also this day filed its bond on removal duly conditioned with good and sufficient surety as provided by law; and it appearing that said petition for removal and said bond were filed before the presentation thereof to this court for acceptance; and it appearing that due and sufficient written notice of said petition and bond was given to plaintiff above named prior to the filing of the same; and it appearing that this is a proper cause for removal to said District Court,

Now, Therefore, it is hereby Ordered, Adjudged and Decreed that the said petition and bond be and the same are hereby accepted, the bond approved, and the above entitled action be and it is hereby ordered removed to the District Court of the United States for the Western District of Washington, Northern Division; that all further proceedings in this court be stayed; and the Clerk of this Court is hereby ordered to prepare and certify a copy of the record [11] in the above entitled action for filing in said District Court, as provided by law.

Done in open court this 6th day of March, 1944.

JAMES B. KINNE

Judge

Presented by

CLARENCE R. INNIS

Of Wright, Innis & Simon

Filed in County Clerk's Office March 6, 1944

[Endorsed]: Filed in the United States District Court April 4, 1944. [12]

Cause No. 351225

State of Washington

County of King—ss.

I, Norman R. Riddell, County Clerk of King County and ex-officio Clerk of the Superior Court of the State of Washington in and for King County, do hereby certify that the foregoing is a full, true and correct transcript of the entire and complete record and files, including full, true and correct copies of journal and minute entries not substantially embodied in said files, in Cause No. 351225, entitled *F. C. Moser, Plaintiff, vs. New York Life Insurance Company, a corporation, defendant*, as the same now appear on file and record in said cause in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of the Superior Court this 14 day of March, A. D. 1944.

[Seal]

NORMAN R. RIDDELL,
County Clerk

By R. C. PARKHURST,
Deputy Clerk.

[Endorsed]: Filed in the United States District Court Apr. 4 1944. [13]

United States District Court,
Western District of Washington

No. 901

F. C. MOSER,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Defendant.

APPEARANCE

To The Clerk Of The Above-Entitled Court:

You will please enter our appearance as attorneys for defendant New York Life Insurance Company, a corporation in the above-entitled cause, and service of all subsequent papers, except writs and process, may be made upon said defendant, by leaving the same with

WRIGHT, INNIS AND SIMON,
RAYMOND G. WRIGHT
CLARENCE R. INNIS
ARTHUR E. SIMON,

Suite 1020 1411 Fourth Avenue Building, Seattle,
Washington.

[Endorsed]: Filed in the United States District Court Apr. 4 1944. [14]

[Title of District Court and Cause.]

BOND OF NON-RESIDENT DEFENDANT
ON REMOVAL

Know All Men By These Presents:

That we, New York Life Insurance Company, a corporation, as Principal, and the Indemnity Insurance Company of North America, as Surety, are held and firmly bound unto the United States of America in the penal sum of Two Hundred Fifty and no/100 Dollars (\$250.00), lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our respective successors and assigns, jointly and severally, firmly by these presents.

Upon Condition, Nevertheless, That

Whereas, the above entitled action has heretofore been removed from the Superior Court of the State of Washington to the above entitled court upon petition of the Said New York Life Insurance Company, a corporation, the defendant therein, and said defendant is about to file the record on removal of said action in the above entitled court;

Now, Therefore, if the said New York Life Insurance Company, a corporation, shall well and truly pay all fees that must by law be paid by said defendant to the Clerk, Marshal, or other officer of the court, and all costs of the action which it may [15] ultimately be required to pay to any other party therein, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals this 4th day of April, 1944.

NEW YORK LIFE INSURANCE COMPANY,

a corporation

By CLARENCE R. INNIS

One of its Attorneys
INDEMNITY INSURANCE
COMPANY OF NORTH
AMERICA

[Seal] By T. A. HILL

Its Attorney-in-Fact.

[Endorsed]: Filed in the United States District Court Apr. 4 1944. [16]

[Title of District Court and Cause.]

NOTICE

To the above named Defendant, and to Raymond G. Wright, Clarence R. Innis, and Arthur E. Simon, its attorneys:

Please Take Notice that the undersigned will bring defendant's motions to dismiss on for hearing before the above entitled Court at the United States Court House, Seattle, Washington, on the 12th day of June, 1944, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

CLARENCE J. COLEMAN

CLAYTON BOLLINGER

Attorneys for Plaintiff

Copy received and service admitted this 7th day of June, 1944.

WRIGHT, INNIS, & SIMON
Attorneys for Defendant

[Endorsed]: Filed June 7, 1944. [17]

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendant moves the court to dismiss plaintiff's action because in the complaint plaintiff fails to state a claim upon which relief can be granted, upon the grounds that (1) plaintiff fails to allege facts sufficient to state such a claim, and (2) it appears affirmatively from the allegations thereof that the action alleged, if any is barred by the statute of limitations of the State of Washington, and by laches on part of plaintiff.

RAYMOND G. WRIGHT

CLARENCE R. INNIS

ARTHUR E. SIMON

Attorneys for Defendant.

WRIGHT, INNIS & SIMON

1411 Fourth Avenue Building
Seattle 1, Washington.

[Endorsed]: Filed April 5, 1944. [18]

[Title of District Court and Cause.]

MOTION FOR MORE DEFINITE STATEMENT OR FOR BILL OF PARTICULARS

Defendant moves the court for an order directing the plaintiff to file and serve a more definite statement, in the particulars hereinafter indicated, of the cause of action alleged in plaintiff's complaint, or, in the alternative, directing plaintiff to file and serve a bill of particulars, with respect to the matters hereinafter set forth, on the ground that the allegations of plaintiff's complaint in respect of each of said particulars are too indefinite and uncertain and that said matters have not been averred in the complaint with sufficient particularity to enable defendant to properly prepare its responsive pleading and to prepare for trial, namely:

1. Requiring plaintiff in respect of the allegations in Paragraphs IV and V to aver whether the contract referred to therein is the written contract identified by plaintiff as Exhibit "B" and annexed to and made a part of the first amended complaint in plaintiff's civil action No. 503 pending in this court against defendant. If such be not the case, that plaintiff be required to aver the particulars in respect of which the said contract referred to in said paragraphs IV and V differs from said Exhibit "B".

2. Requiring plaintiff in respect to the allegations in paragraphs V and VI to aver whether "Nylic" referred to by plaintiff as "a system which embraces two periods, the first period of twenty [19] (20) years designated by the defendant as the

'qualifying Nylie Period', and the lifetime period thereafter designated by the defendant as the 'Senior Nylie Period,' is the "Nylie Contract" referred to by plaintiff in paragraph VI of the first cause of action in plaintiff's first amended complaint in his civil action No. 503 pending in this court against defendant, which is therein identified by plaintiff as Exhibit "F" and made a part of the complaint of plaintiff in said action. If such be not the case, that plaintiff be required to aver the particulars in respect of which the said "Nylie" and the "Dual Agency System" referred to in said paragraphs V and VI differ from the provisions of said Exhibit "F".

3. Requiring plaintiff in respect of the allegations in paragraphs VII and VIII to aver

(a) Whether the contract referred to therein as the "Agency Agreement dated August 17, 1910" is the written agreement referred to by plaintiff in paragraph V of the first cause of action in the first amended complaint in plaintiff's civil action No. 503 pending in this court against defendant which is therein identified by plaintiff as Exhibit "C" and made a part of plaintiff's complaint in said action. If such be not the case, that plaintiff be required to aver the particulars in respect of which the said agency agreement referred to in said paragraphs VII and VIII differs from the said Exhibit "C";

(b) Whether the "Nylie Contract" referred to in said paragraphs VII and VIII is the "Nylie Contract" which is identified by plaintiff as Exhibit

“F” and as such is annexed to and made a part of the first cause of action in the first amended complaint in plaintiff’s civil action No. 503 pending in this court against [20] defendant. If such be not the case, that plaintiff be required to aver the particulars in respect of which the said “Nylic Contract” referred to in paragraphs VII and VIII differs from the said Exhibit “F”.

4. Requiring plaintiff in respect of the allegations of paragraph VI to aver

(a) the name of each representative or agent of defendant who, as alleged by plaintiff, “represented to the plaintiff that the plaintiff’s compensation under said Dual Agency System during plaintiff’s qualifying Nylic period which the parties agreed to be for seventeen (17) years expiring January 1, 1928, would be the equal of the 45 per cent in renewals provided for in the said agreement dated January 1, 1908” and the title or position of each of said representatives with the defendant at the time plaintiff claims any such representation was made;

(b) The date or dates upon which plaintiff claims each of such representations was made;

(c) The place or places where plaintiff claims each of such representations was made.

(d) Whether such representations were oral or in writing;

(e) If any of them were in writing, the date or dates thereof and a description sufficient to identify the writing, together with a copy thereof in the event plaintiff has a copy; and

(f) If oral, the specific promise or representation which plaintiff claims was made.

5. Requiring plaintiff in respect of the allegations in Paragraphs IX and X to aver

(a) Each date during the seventeen year period ending December 31, 1927, upon which plaintiff was paid by defendant renewal commissions which plaintiff alleges were in the aggregate [21] amount of \$52,171.54, and the amount of each payment, indicating each of the policies upon which each payment of said renewal commissions was paid, the name of the policy holder, the number of the policy, the date of issue of each of said policies, and the kind of life insurance provided for in each;

(b) Each date during the seventeen year period ending December 31, 1927, upon which plaintiff was paid by defendant Nylie monthly income payments in addition to said renewal commissions paid to plaintiff, and the amount of each of said monthly Nylie payments received by plaintiff during said period; and

(c) Each date subsequent to December 31, 1927, that plaintiff as a Senior Nylie has received from defendant Nylie monthly income payments and the amount of each of said payments.

RAYMOND G. WRIGHT

CLARENCE R. INNIS

ARTHUR E. SIMON

Attorneys for Defendant.

WRIGHT, INNIS & SIMON

1411 Fourth Avenue Building
Seattle 1, Washington.

[Endorsed]: Filed April 5, 1944. [22]

[Title of District Court and Cause.]

ORDER OF APPEARANCE

Mr. Clerk:

Enter my appearance as attorneys for the plaintiff in the above-entitled case.

Dated at Seattle, Wash. on 7 day of June, 1944.

CLARENCE COLEMAN

Address: Everett, Wash.

[Endorsed]: Filed June 7, 1944. [23]

[Title of District Court and Cause.]

NOTICE OF FILING RECORD OF REMOVAL

To F. C. Moser, Plaintiff, and J. C. Bolinger and
Clarence J. Coleman, his Attorneys:

You, and each of you, are hereby notified that on the 6th day of March, 1944, by order of the Superior Court of the State of Washington for King County, the above entitled cause was duly removed from said court to the District Court of the United States for the Western District of Washington, Northern Division.

You are further notified that on the 4th day of April, 1944, a duly certified copy and transcript of the record of said cause was filed in the said District Court in the office of the Clerk of the Northern Division of said District in Seattle, Washington, and the undersigned entered their appearance as

attorneys for the defendant, New York Life Insurance Company, a corporation.

You are further notified that service of all subsequent papers, except writs and process, may be made upon the undersigned at their address below stated.

Dated this 4th day of April, 1944.

RAYMOND G. WRIGHT

CLARENCE R. INNIS

ARTHUR E. SIMON

Attorneys for Defendant.

[Endorsed]: Filed April 5, 1944. [24]

In the Superior Court of the State of Washington
in and for the County of King

No. 901

F. C. MOSER,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

Defendant.

SUMMONS

The State of Washington to New York Life Insurance Company, a Corporation, defendant:

You Are Hereby Summoned to appear within twenty (20) days after the service of this summons upon you if served within the State of Washington,

and within sixty (60) days after the service of this summons upon you if served outside the State of Washington, exclusive of the day of service, and defend the above entitled action in the Superior Court of King County aforesaid; answer the complaint of the plaintiff, and serve a copy of your answer upon the undersigned attorneys for plaintiff at their office hereinbelow stated; and, in case of your failure so to do, judgment will be rendered against you in accordance with the demands of the complaint of plaintiff, which will be filed with the clerk of the above entitled court (a copy of which is herewith served upon you.)

CLARENCE J. COLEMAN

J. C. BOLLINGER

Attorneys for Plaintiff

Endorsed]: Filed June 14, 1944. [25]

[Title of Superior Court and Cause.]

COMPLAINT

Comes now the plaintiff and for his cause of action against the defendant complains and alleges:

I.

That the plaintiff is now and at all times herein mentioned has been a resident of Seattle, King County, Washington.

II.

That the defendant is a foreign corporation and

at all times herein mentioned has been and now is doing business in the State of Washington under and pursuant to the applicable laws of the State of Washington permitting foregoing corporations to do business in this state; that said defendant at all of said times has and does now maintain an office in Seattle, King County, Washington, for the transaction of company business.

III.

That at all times from October 7, 1907, to and including August 22, 1936, the plaintiff was a special agent of the defendant corporation for the purpose of canvassing for applications for life insurance and annuities and performing such other duties as might be required of him by the terms of his contract of employment with the defendant corporation consisting of agency agreements and Nylie. [26]

IV.

That on or about January 1, 1908, plaintiff entered into a contract with the defendant wherein the plaintiff was to employ his full time as a soliciting life insurance agent for the defendant, which agreement provided for compensation to the plaintiff of nine (9) renewals of five (5) per cent each, or a total renewal commission of forty-five (45%) per cent.

V.

That some time in the year 1910 the defendant established for its life insurance soliciting agents a "dual agency system" consisting of "Nylie" and

a single agency agreement; that "Nylie" is a system which embraces two periods, the first period of twenty (20) years designated by the defendant as the "Qualifying Nylie Period" and the lifetime period thereafter designated by the defendant as the "Senior Nylie Period."

VI.

That during the year 1910 while the plaintiff was working for the defendant under said agreement dated January 1, 1908, the defendant in order to have the plaintiff surrender his said agreement dated January 1, 1908 and to permit the defendant to substitute therefor an agreement under the defendant's said Dual Agency System represented to the plaintiff that the plaintiff's compensation under said Dual Agency System during plaintiff's qualifying Nylie period which the parties agreed to be for seventeen (17) years expiring January 1, 1928, would be the equal of the 45% in renewals provided for in the said agreement dated January 1, 1908.

VII.

That plaintiff relying upon said representations [27] entered into a contract with defendant under the said Dual Agency and "Nylie" system and surrendered the contract dated January 1, 1908, and in lieu thereof defendant gave plaintiff an agency agreement dated August 17, 1910 and a "Nylie" contract, both to become simultaneously effective on January 1, 1911.

VIII.

That at all times during said plaintiff's said qualifying "Nylie" period of 17 years between January 1, 1911 and January 1, 1928, the plaintiff performed services under said contract relying upon the said defendant's representations as to the amount of compensation to be paid plaintiff by the defendant thereunder.

IX.

That said representations were false and fraudulent in that the plaintiff actually received during said period from the defendant under said Dual Agency System, \$52,171.45 in renewal commissions and \$56,498.95 in "Nylie" payments, or a total Dual Agency payment of \$108,709.82, whereas during this same period plaintiff would have been entitled to receive the sum of \$156,514.35 in renewal commissions under the single agency agreement dated January 1, 1908, and that by reason of the premises defendant has wrongfully defrauded plaintiff out of the sum of \$47,804.53, which sum is now due and owing.

X.

That the defendant at all times made all the calculations, handled all of the funds and made all the payments on compensation that was due based on its own calculations; that the plaintiff reposed great confidence in the defendant and its methods of business and that a fiduciary relationship existed between the parties and that as a result of plaintiff's trust as to the manner of the operations of the de-

fen- [28] dant plaintiff did not discover that said representations as to the amount of his compensation were falsely and fraudulently made to him and that plaintiff did not discover that such representations were false and fraudulent until within a period of at least a year from the date hereof.

Wherefore plaintiff prays judgment against the defendant in the sum of \$47,804.53, together with interest thereon at the legal rate and for his costs and disbursements herein and for such other and further relief as to the court may seem just.

CLARENCE J. COLEMAN

Attorneys for Plaintiff.

State of Washington
County of Snohomish,—ss.

F. C. Moser, being first duly sworn on oath, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint, know the contents thereof and believes the same to be true.

F. C. MOSER

Subscribed and sworn to before me this 11 day of February, 1944.

CLARENCE J. COLEMAN

Notary Public in and for the State of Washington,
residing at Everett.

[Endorsed]: Filed in the United States District Court, June 14, 1944. [29]

In the District Court of the United States,
for the Western District of Washington
Northern Division

File No. 901
Civil Action

F. C. MOSER,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Defendant.

ORDER CONTINUING THE HEARING OF
DEFENDANT'S MOTION TO DISMISS.

Be It Remembered that this matter heretofore on the 14th day of June, 1944, came on duly and regularly for hearing before the Honorable Lloyd L. Black, United States District Judge, one of the judges of the above entitled court, upon defendant's Motion to Dismiss plaintiff's action, and the court having informally conferred with counsel, with the consent of counsel for plaintiff and defendant respectively, it is by the court

Ordered that the hearing of said motion be and the same hereby is continued until two o'clock, Pacific War Time, in the afternoon of August 7, 1944, at which time the same will be heard unless plaintiff has failed to serve and file on or before July 10, 1944, the Bill of Particulars which plaintiff is required to serve and file in accordance with separate order this day entered herein.

Done in open court this 3rd day of July, 1944.

LLOYD L. BLACK

United States District Judge.

Approved:

CLARENCE J. COLEMAN

Attorney for plaintiff

Approved and presented by:

CLARENCE R. INNIS

Attorney for Defendant

[Endorsed]: Filed July 3, 1944. [30]

[Title of District Court and Cause]

ORDER GRANTING DEFENDANT'S MOTION
FOR BILL OF PARTICULARS

Be It Remembered that this matter heretofore on the 14th day of June, 1944, came on duly and regularly for hearing before the Honorable Lloyd L. Black, United States District Judge, one of the judges of the above entitled court, upon defendant's Motion for More Definite Statement or Bill of Particulars, and the court having conferred informally with counsel for the respective parties and having indicated the views of the court in respect of said motion, with the consent of counsel for plaintiff and defendant respectively, it is ordered by the court.

Ordered, Adjudged and Decreed that defendant's said motion be and the same hereby is granted to the extent hereinafter set forth, and that plaintiff be and he hereby is directed to serve and file herein on or before July 10, 1944, a Bill of Particulars

in which plaintiff shall aver as hereinafter set forth, namely:

1. In respect of the allegations of paragraphs IV and VI plaintiff shall aver and set forth in said Bill of Particulars as a part thereof a complete copy of the contract which plaintiff alleges he entered into with defendant on or about January 1, 1908, wherein plaintiff "was to employ his full time as a soliciting agent for the defendant, which agreement provided for compensation to plaintiff of nine (9) renewals of five (5) per cent each, or a total renewal commission of forty-five (45) per cent."

[31]

2. In respect of the allegations in paragraphs V and VI plaintiff shall aver and set forth in said Bill of Particulars as a part thereof complete copies of the specific Nylie and "Single Agency Agreement" referred to in paragraph V and the specific written agreement or agreements which plaintiff entered into with defendant upon the surrender by plaintiff, as alleged, of "his said agreement dated January 1, 1908"; and plaintiff shall aver and set forth in said Bill of Particulars as a part thereof a complete copy of any other written agreement upon which plaintiff is relying as a basis for recovery in this action.

3. In respect of the allegations in paragraphs VII and VIII plaintiff shall aver and set forth in said Bill of Particulars as a part thereof a complete copy of the alleged contract "with defendant under the said dual agency and 'Nylie system'", and a complete copy of the agency agreement dated Au-

gust 17, 1910, and the "Nylie Contract" referred to in said paragraphs VII and VIII; and in addition a complete copy of any other written agreement or contract upon which plaintiff is relying as a basis for recovery in this action.

4. In respect of the allegations in paragraph VI plaintiff shall aver and set forth in said Bill of Particulars

(a) the name of each representative or agent of defendant who, as alleged by plaintiff "represented to the plaintiff that the plaintiff's compensation under said dual agency system during plaintiff's qualifying Nylie period which the parties agreed to be for seventeen (17) years expiring January 1, 1928, would be the equal of the forty-five (45) per cent in renewals provided for in said agreement dated January 1, 1908", and the title or position of each of said representatives with the defendant at the time plaintiff claims such representations were made;

(b) The date or dates upon which plaintiff claims each of such representations was made.

(c) the place or places where each of said representations was made; [32]

(d) whether such representations were oral or in writing; and

(e) if any of said representations were in writing, the date or dates of each and a complete copy of each and if any of said representations relied upon by plaintiff were oral the specific promise or representation which plaintiff claims was made in each *instants*.

5. In respect of the allegations in Paragraphs IX and X plaintiff shall aver and set forth in said Bill of Particulars

(a) the exact aggregate amount of the sums of \$52,171.54 referred to in said paragraphs, which plaintiff received from defendant prior to January 1, 1928, without further itemization, and in respect of the balance of said \$52,171.54 which plaintiff may have received from defendant subsequent to December 31, 1927, plaintiff shall aver and set forth in said Bill of Particulars the amount of each separate payment received by him, indicating in each instance the policy upon which each of such payments of said renewal commissions was paid to plaintiff by defendant subsequent to December 31, 1927, the date of each of said payments, the name of each of the said policy holders and the number of each of the policies on account of which such payments were made, the date of issue of each of such policies, and the kind of life insurance provided for in each application: and

(b) the exact aggregate amount of the sum of \$56,498.95 referred to in said paragraphs as having been paid to plaintiff by defendant "in 'Nylie' payments" which plaintiff received from defendant prior to January 1, 1928, without further itemization, and in respect of the balance of said \$56,498.95 which plaintiff may have received from defendant subsequent to December 31, 1927, as Nylie monthly income payments referred to in said paragraph IX

plaintiff shall aver and set forth in said Bill of Particulars the amount of each of said separate Nylic monthly payments received by plaintiff subsequent to December 31, 1927, and the date upon which each of said payments was received. [33]

Defendant is hereby granted permission to serve and file, on or before August 1, 1944, further motions, if any, which defendant may desire to direct to plaintiff's complaint as supplemented by said Bill of Particulars.

Done in open court this 3rd day of July 1944.

LLOYD L. BLACK

United States District Judge.

Approved:

CLARENCE J. COLEMAN

Attorney for Plaintiff

Presented by:

CLARENCE R. INNIS

Attorney for Defendant

[Endorsed]: Filed Jul 3 1944. [34]

[Title of District Court and Cause.]

BILL OF PARTICULARS

To the above named defendant and to Raymond G. Wright, Clarence R. Innis and Arthur E. Simon, attorneys for Defendant:

Please take notice that the plaintiff, in compliance with your motion for a Bill of Particulars,

hereby furnishes the information requested in the particulars indicated in your said motion, as follows:

I.

That in response to Paragraph I of the motion for a bill of particulars plaintiff attaches hereto Exhibit "A", the same being Exhibit "B" in Cause No. 503 of the records and files of the above entitled court.

II.

That in response to Paragraph II of the motion for a bill of particulars plaintiff attaches hereto Exhibit "B", the same being Exhibit "F" in Cause No. 503 of the records and files of the above entitled court.

III.

That in response to Paragraph III of the motion for a bill of particulars plaintiff attaches hereto Exhibit "C", the same being Exhibit "C" in Cause No. 503 of the records and files of the above entitled court.

IV.

In response to Paragraph IV of the motion for a bill of particulars plaintiff submits the following:

[35]

(a), (b), (c), (d), all were oral. L Seton Lindsay, Agency Director, on several different dates during the year 1910 at Seattle, Washington. Gilbert Smith, Inspector of Agencies, during 1910 at San Francisco and Seattle, exact dates plaintiff cannot recall. Thomas A. Buckner, Vice President in the year 1910 at Home Office, exact date un-

known, at Seattle, Washington, some time during the months of April or May, 1910, and at 1910 Two Hundred Thousand Dollar Club Convention. E. R. Perkins, Vice President, in 1910, at Home Office, exact date unknown. George W. Perkins, in 1910 at New York, exact date unknown, said Perkins being the principal founder of defendant's Nylie System, a former Vice President of defendant and at that time a Member of the Banking Firm of J. Pierpont Morgan, but still very closely identified with defendant.

(f). The specific promise and representations were that if plaintiff would surrender to defendant plaintiff's agency agreement dated January 1, 1908, plaintiff's Exhibit "A" and permit defendant to substitute for same defendant's Dual Agency System comprising an agency agreement, plaintiff's Exhibit "C" and "Nylie", plaintiff's Exhibit "B", that the compensation of plaintiff under said Dual Agency System during the qualifying Nylie period of said Nylie System which it was agreed would be for 17 years from January 1, 1911 to January 1, 1928, would equal or exceed compensation which plaintiff would make during said 17 years under plaintiff's agency agreement, Exhibit "A". Plaintiff's Agency Agreement, exhibit "A" provided for nine renewals of 5% each and one extra fifth year renewal of 5%.

V.

With respect to information ordered by the court to be furnished pursuant to Paragraph V of defendant's motion for bill of particulars the following is submitted:

All of the nylic payments set forth in a sum of \$56,498.95 [36] were received by plaintiff prior to January 1, 1928.

The aggregate amount of the item of \$52,171.54 received by plaintiff prior to January 1, 1928 was \$49,278.66. The difference between said two sums, namely \$2892.88, was received by plaintiff after January 1, 1928 and is hereinbelow set forth in a table giving all of the information thereon that is available to plaintiff.

| Name | Policy Number | Plan of Insurance | Amount Paid | Anniversary Date | Date Paid |
|------------|---------------|-------------------|-------------|------------------|-----------------|
| Wright | 7911888 | O.L. | \$ 360.19 | 1/18/27 | 2/ 4/28 |
| Pease | 9732196 | O.L. | 573.12 | 1/25/27 | 2/15/28 |
| Bradner | 9744955 | O.L. | 648.12 | 1/25/27 | 2/15/28 |
| Stone | 9928801 | O.L. | 49.71 | 7/13/27 | 8/13/28 |
| Diekey | 9739002 | O.L. | 95.59 | 3/ 1/27 | 3/30/28 |
| Diekey | 9987494 | O.L. | 95.59 | 4/ 6/27 | 4/11/28 |
| Garrett | 9870894 | O.L. | 284.76 | 5/25/27 | 5/19/28 |
| Rothweiler | 9982662 | no exact reed. | 12.56 | 9/12/27 | 9/ 8/28 |
| Farmer | 10020576 | O.L. | 156.69 | 10/ 6/27 | no exact reerd. |
| Farmer | 10020284 | O.L. | 17.90 | 10/ 6/27 | no exact reerd. |
| Kay | 7956386 | 20 yr. End. | 95.18 | 11/10/27 | 11/10/28 |
| McQuade | 10062748 | O.L. | 180.09 | 1/ 4/28 | 2/15/29 |
| Welsh | 10094128 | O.L. | 89.51 | 12/28/28 | 12/29/29 |
| Welsh | 10094129 | O.L. | 156.60 | 12/28/28 | 12/29/29 |
| Welsh | 10094130 | O.L. | 76.91 | 12/28/28 | 12/29/29 |
| | | | \$2892.88 | | |

Respectfully Submitted,
 CLARENCE J. COLEMAN
 CLAYTON BOLLINGER
 Attorneys for Plaintiff.

Copy Received this 5 day of July 1944.

WRIGHT, INNIS & SIMON,
Attorney for Defendant.

[Endorsed]: Filed Jul 8, 1944. [37]

EXHIBIT A

This Agreement, made this 1st day of January in the year 1908, by and between the New-York Life Insurance Company, as party of the first part, and Frederick C. Moser of Seattle in the County of King and State of Washington, as party of the second part, Witnesseth,—

That said parties, in consideration of the mutual covenants and agreements herein contained, hereby mutually covenant and agree with each other, as follows, to wit:

That said first party hereby appoints said second party its special Agent for the purpose of canvassing for applications for insurance on the lives of individuals, and of performing such other duties in connection therewith, as the Officers of said first party may in writing expressly require of him, and that this appointment is made upon the following terms, conditions and agreements:

1st. It is agreed that said second party shall have no authority for or on behalf of said first party to accept risks of any kind, to make, modify or discharge contracts, to extend the time for paying any premium, to bind the Company by any statement, promise or representation, to waive forfeitures or any of the Company's rights or customary

requirements, to name any extra premium for extra risks or privileges, to receive any moneys due or to become due to said first party except upon applications obtained by or through him and then only in exchange for the coupon receipt attached to the application corresponding in date and number with the application, or upon policies or renewal receipts signed by the President, a Vice-President, a Secretary, or the Treasurer, sent to him by the first party for collection.

2d. It is agreed that the second party as such agent shall devote his best talents and energies to the business of this appointment, shall promptly deliver to the first party all applications for insurance upon the Annual Dividend Plan taken or obtained by him whether the medical examiner has reported thereon favorably or unfavorably, and shall strictly observe each and all the rules, regulations, and requirements contained in the first party's book of "Instructions to Agents" issued from time to time, and such special instructions as may from time to time be given to him by any officer of the first party.

3d. It is agreed that the second party shall keep regular and accurate accounts of all transactions under this appointment, and, whenever required by the first party or its authorized agent, shall transmit to the first party a report in detail, embracing every item of business done by or through him and a statement of all moneys collected or received by or through him or on account of said first party.

4th. It is agreed that all books of account, documents, vouchers, and other books or papers whatsoever connected with the business of this appointment, shall be the property of the first party, whether paid for by it or not, and at any and all times shall be open to the first party or its representative for the purpose of examination, and shall be turned over to the first party or its representative on its order at the termination of this appointment, provided, however, that no entry contained in any book of account or other document made or kept by said second party shall be binding [38] on the first party, nor shall any such entry be used as evidence in any dispute between said parties unless the same shall have been first duly examined and approved by the authorized representative of the first party.

5th. It is agreed that all moneys received by the second party for or on behalf of the first party, shall be securely held by him as a fiduciary trust and shall not be used by him for any personal or other purpose whatsoever, but shall be by him immediately paid over to the first party; and that if the second party shall withhold any money, policies, or receipts belonging to the first party after the same have been reported or transmitted to said first party, or if he shall withhold any money, policies, or receipts after they shall have been by it demanded from him, such dereliction shall immediately and without further notice work an unconditional forfeiture of all claims and demands whatsoever accrued or to accrue under this or any pre-

vious agreement, but nothing herein contained shall be construed to affect any rights or claims of said first party against said second party.

6th. It is agreed that the district within which said second party shall have permission to operate is such portions of the State of Washington or such other territory as the first party may direct from time to time, and that the second party shall report his business through the first party's Seattle Branch Office.

7th. It is agreed that said second party shall thoroughly and ably canvass said district; that the first party may, at its option, employ other Agents in said district, and that the second party shall have no claim for commissions or other remuneration on the business effected by such other Agent or Agents so employed.

8th. It is agreed that if in any case the first party shall deem it proper, in consequence of misrepresentations claimed to have been made or misunderstandings had at or before the time of the delivery of a policy, to cancel the policy and return the premiums thereon or any part thereof, the second party shall in such case lose all right to commissions thereon, and shall repay to the first party, on demand, the amount of commissions received on account of such policy.

9th. It is agreed that said second party shall collect from time to time and promptly remit to the first party all renewal premiums which the first party may authorize him to collect by delivering to

him for that purpose the Company's official renewal receipt, but not otherwise.

10th. It is agreed that the necessary expenses for medical examinations (except as provided in Section 17th hereof and in the Company's book of "Instructions to Agents"), for expressage on documents and other things sent by the first party to the second party shall be paid by the first party, and that the first party shall furnish to the second party such a supply of blanks and circulars as it shall deem reasonable; but the first party shall be liable to pay no charge other than as herein stated, or as shall hereafter be allowed in writing by the first party.

11th. It is agreed that the first party shall have, and it is hereby given, a lien upon any commissions or claims for commissions under this or any prior agreement as security for the payment of any claims due or to become due to said first party from said second party. [39]

12th. It is agreed that the second party shall not enter the service of, or place any applications for Annual Dividend insurance with, any other life insurance company, without the consent in writing of the first party, so long as he owes any indebtedness to said first party.

13th. It is agreed that the first party's ledger account with said second party shall at all times be competent and conclusive evidence of the state of the account between the parties hereto, and shall constitute a mutual estoppel as between them. In consideration of the last above agreement in this

paragraph contained, the first party agrees to furnish to the second party a copy of his said ledger account, not oftener, however, than once a month, upon receipt of written request therefor, due allowance to be made, however, for clerical delays in furnishing the same, and if one copy of his ledger account has been furnished him, any subsequent copy may consist only of the additional ledger entries made since the date of such copy, or may consist only of the additional ledger entries made since the date of the last copy of additional ledger entries furnished him.

14th. It is agreed that said second party shall keep deposited with the first party a bond for a satisfactory amount, with satisfactory sureties, conditioned for the faithful performance of his duties as such agent.

15th. It is agreed that in case any other special agent or person acting for the first party shall obtain any business jointly with him, the commission hereinafter provided shall be divided equally between the parties hereto, unless otherwise expressly agreed in writing; that when policies are returned for change and an allowance made on the old policy which is applied to the payment of the premium on the new, no commission shall be allowed on the amount thus transferred from the old to the new policy, and that the commission provided in Section 20 shall not apply when the insured is over sixty years of age.

16th. It is agreed that if the second party shall sell or offer to sell, directly or indirectly, to any

person or persons, policies for insurance to be issued by said first party, at any reduction from the regular Table rates as furnished to said second party by the first party, said sale or offer of sale shall work an immediate termination of this agreement and a forfeiture of all rights and claims arising on account of it without altering or impairing any rights or claims of said first party against said second party.

17th. It is agreed that, in case a policy issued as applied for shall be subsequently returned as "not taken," the second party shall pay to the first party such sum of money as shall cover all fees and expenses connected with issuing such policy.

18th. It is agreed that either party hereto may without cause terminate this agreement upon thirty days' written notice, but when so terminated the commissions on business procured under it by the second party prior to such termination shall thereafter accrue and be paid to him according to the terms of this contract the same as if it had not been terminated, less any indebtedness to the Company; that if, however, said first party shall terminate this agreement within two years from the date of its taking effect for any violation thereof or misconduct by the second party, no commissions or other compensation shall thereafter accrue or be payable under it or otherwise. [40]

19th. It is expressly understood and agreed that this agreement shall be considered strictly confidential, and that under no circumstances shall said

second party mention or exhibit the terms thereof to any person or persons.

20th. It is agreed that the second party shall be **allowed under this agreement**, and that the first party shall pay him, the following compensation only, unless otherwise expressly agreed in writing, to wit:

A commission on the original cash premium for the first year of insurance, and upon renewal premiums for the years of insurance stated below which shall, during his continuance as said Agent and only in such event, except as otherwise expressly provided herein, be obtained, collected, paid to and received by the first party on participating policies of insurance effected with said first party upon the lives of individuals whose written applications therefor were obtained by or through the second party, issued at ages sixty and under, which commissions shall be at and after the following rates,—

| | On Premiums for First Year | On Premiums for 2nd to 6th Years, Inclus. |
|---|----------------------------------|---|
| A. | | |
| A. Ordinary Life, Endowments paid by 40 annual premiums and Ten-Year Renewable Term policies..... | 55% | 5% |
| B. Limited-payment Life Policies paid by 20 or more annual premiums and Endowments paid by 35 annual premiums | 50% | 5% |
| C. Fifteen-payment Life and Endowments paid by 30 annual premiums | 45% | 5% |
| D. Ten-payment Life and Endowments paid by 25 annual premiums..... | 40% | 5% |
| E. Endowments paid by 20 annual premiums | 35% | 5% |
| F. Endowments paid by 15 annual premiums | 30% | 3% |

| | On Premiums for First Year | On Premiums for 2nd to 6th Years, Includ. |
|--|----------------------------------|---|
| A. | | |
| G. Endowments paid by 10 annual premiums | 20% | 3% |
| H. Child's Pure Endowments, payable at age 25 or under, and Ten-, Fifteen and Twenty-Year Child's Endowments, exchangeable at age 15.... | 15% | 3% |

- B. On Five-Year Renewable Term policies a commission at the rate of 50% on the premiums for the first year of insurance and a commission on the renewal premiums for the second to the fifth years of insurance, both inclusive, at the rate of 5%.
- C. On all Term Insurance other than that specified in subdivisions "A" and "B" hereof, the compensation shall be a single and only brokerage commission of 30% of the original first years', or parts thereof, premiums.
- D. On all forms of insurance (except Annuities) and for all ages not included in subdivisions "A", "B" and "C" hereof, the commission for the first year shall be such per centum of the premium as will yield in amount a sum equal to 50% of the premium for an Ordinary Life Policy of the same amount and at the same age, but no commission on the renewal premiums shall be allowed.
- E. On all Annuities the compensation shall be such as the Company shall allow in writing in each specific case.

21st. It is agreed that if this agreement shall continue in full force and effect for a period of two years from the date of its taking effect, the renewal commissions specified in subdivision "A" of Section 20th shall, as additional compensation, be extended to cover the 7th, 8th, 9th and 10th years of insurance, and all renewal commissions provided for in this contract shall, as they accrue after said two years, be credited to the account of the second party with the first party, and be payable to him, his executors, administrators or assigns, less any in-

debtedness to the Company, anything in this agreement to the contrary notwithstanding.

22d. It is agreed that this agreement shall take effect on the 1st day of January, 1908, if duly signed by the second party, and countersigned on behalf of the first party by its Contract Registrar at its Home Office, and by one of its Agency Directors, Supervisors or Inspectors of Agencies. 23rd—It is agreed that in consideration of this agreement all existing agreements between the parties hereto are hereby terminated.

In Witness Whereof, the parties to this agreement have subscribed their names to duplicate copies hereof the day and year first above written.

Sec. 23rd inserted before signing. EAL

NEW-YORK LIFE INSUR-
ANCE COMPANY

By THOS. A. BUCKNER

Vice-President.

FRED C. MOSER

Countersigned by

E. A. LEWIS

Contract Registrar.

S. SETON LINDSAY

A. D. [42]

EXHIBIT B

(page 3)

“NYLIC”

No. 2

A System of Benefits for Persistent and Successful Agents

Devised and Practiced by the New York Life Insurance Company

Thomas A. Buckner President

Edition of July, 1910

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This book described Nylic No. 2 as far as Nylic and its benefits apply to agents in the United States and Canada entering Nylic or qualifying under the terms and conditions of Nylic on and after July 1, 1910. It applies to all agents in the United States and Canada who did not qualify in Nylic and retain membership under rules, prior to July 1, 1910, holding written contracts of employment with the Company dated subsequent to August 1, 1910.

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NYLIC

No. 2

The name is derived from combining the initials of the several words which make up our corporate name,—New York Life Insurance Co.

Nylic is a body of persistent and successful men within the ranks of those who create the business of the New York Life Insurance Company.

It has been established in order to give permanency and character to the work of the soliciting agent. Its effect will be primarily to benefit the agent himself, but the ultimate benefits will inure to the policy-holder of the Company.

How It Will Benefit the Policy-Holders

Nylic will benefit the policy-holders of the New York Life Insurance Company because it will directly, and we believe effectually, stop what may be called "waste" in the creation of our business. How to avoid waste is one of the greatest social and economic questions of the hour. It is scarcely an exaggeration to say that, if the waste in any given line of human enterprise could be entirely eliminated, the profits of that enterprise would be doubled, or, to put it the other way, the cost of production [44] would be very largely reduced. We call it "waste" because there seems to be no better term to apply to it. The use of the word does not imply that earnest and intelligent efforts have not been made by all efficient life insurance companies to improve methods of getting business, but rather that, while efforts have been made, no very effective remedy has heretofore been discovered.

The first problem that faces the management of the agency department in a growing and successful company is, how to secure, educate and keep agents of the right character and capacity. An inspection of the books of any company will reveal an astonishing condition as to the length of service of the average agent. It is not an exaggeration to say that too many agents are migratory, shifting and uncertain in their company-connections. Certain unfortunate and unprofitable consequences follow from this. The uncertainty of his relations with any company fosters a spirit of irresponsibility, and, having no fear of punishment or hope of re-

ward to prevent him from changing his allegiance as often as he sees fit, or as often as he thinks he can presently make a dollar more, the agent frequently does not hesitate over what he says to the public, knowing that next month or next year he may be working not only for another company but in another field. The direct result of this is, that the men whom he insures speedily allow their policies to lapse, and become enemies of life insurance itself. The public charges up against our business the misdeeds of men whose evil tendencies the current organization of most life insurance companies has been powerless to correct.

The policy-holder's interest in all this is very easily discovered. Business that lapses in this way is unprofitable and always must be so, and business done in this way brings disrepute upon the profession, makes it more difficult to secure the services of desirable men, opens the door to the most reprehensible, expensive and dangerous forms of competition, and in the end results not [45] only in the moral loss which we have been outlining, but frequently in a financial loss in which persistent policy-holders are deeply interested. This waste assumes very serious form to the policy-holder when he considers the amount of energy and time and direct expense which is necessary in order to keep the ranks of an active agency department up to the proper standard. If a company has in its employ several thousand agents, an inspection of its books will show that their average term of service is only a few years. The amount of energy which must be constantly ex-

pended to recruit new material to take the place of the men who disappear, is very great. There is a certain amount of expense connected with every new agency contact made, and further expense when that contact is terminated. Any plan, therefore, which has for its object permanency of service, inseparably associated with personal honesty, loyalty, fidelity and achievement, on the part of the agent, must tend to reduce expenses, and at the same time elevate the business of life insurance. It is believed that Nylie directly subserves these purposes.

HOW IT WILL BENEFIT THE AGENT

“A rolling stone gathers no moss.” On the one hand, the agent who is perpetually shifting into the business and out of the business, from one company to another upon the slightest pretext, rarely if ever accumulates either money or desirable position. On the other hand, the agent who persists—working year after year in the interests of one company—soon becomes identified in the public mind with that company. He gives the company character and the company gives him character. The necessary consequence is that the business which he does is of a kind that is profitable at once to the policy-holder and to himself. A review of the records of any life insurance company on this point will show that the men who ultimately acquire a competency and an established and desirable position in the community in which they live, are the men who persistently and quietly keep at

their work in one company. They may [46] not make a great noise about it, and their names may never appear in the daily press, but after a time, almost without exception, you will find that these are the men who have really been successful.

Any plan, therefore, which shows a man who is about to enter upon the business of life insurance that his best interests all lie in persistent and continuous service, any plan which meets the almost dangerous independence which necessarily goes with the solicitor's work, with penalties for irresponsibility and with inducements towards steadiness of application, regularity of effort, personal responsibility and strict honesty, must greatly benefit the profession. Nylie is such a plan.

In addition, Nylie will be at once profitable both to the agent and the policy-holder, in that it is one of the most powerful agencies in the destruction of the rebate evil. At the present time, nearly all American life insurance companies are pledged to the most radical measures against rebating. The rule laid down by the New York Life is, that any agent found engaging in this practice will be summarily dismissed. Dismissal will, of necessity, forfeit all rights in Nylie. Rebating then, under the Rules of Nylie becomes at once an enemy of the agent as well as of the policy-holder. Practicing it in any way, directly or indirectly, involves such serious consequences that no agent who has the slightest regard for his own interests will indulge in it himself or knowingly allow any competing agent to do so.

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**GENERAL CONDITIONS OF MEMBERSHIP
FOR ALL AGENTS IN THE UNITED
STATES AND CANADA ENTERING
AFTER JULY 1, 1910**

Nylic No. 2 is composed of five classes, as follows:

First. — Freshmen.

Second. — First Degree.

Third. — Second Degree.

Fourth. — Third Degree.

Fifth. — Senior Nylics. [47]

FRESHMAN NYLICS

Any agent of the New York Life Insurance Company, in good and regular standing, shall, upon making written application on the Company's authorized form, and upon agreeing, so long as he remains a member of Nylic, to devote all his time, talents and energies to the Company's service in soliciting personally for business, and also upon receiving a certificate of membership executed by the Company, become a Freshman Nylic as of January 1, preceding the date of his contract, or on any January 1 thereafter, as he may elect, if he complies with all of the conditions laid down herein.

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AFTER TWO NYLIC YEARS' SERVICE

Freshman Nylics shall receive, subject to all the rules of Nylic, monthly from the New York Life Insurance Company a sum of money as follows:

For his 3d year of continuous membership in Nylie the monthly income shall be equal to 25 cents per thousand on the amount of business procured and paid for, as above, during his first Nylie year, after deducting from same the amount of said year's business which has lapsed by non-payment of premium, been canceled, or otherwise terminated up to December 31 of his second Nylie year.

For his 4th year of continuous membership in Nylie the monthly income shall be equal to 25 cents per thousand on the amount of business procured and paid for, as above, during his second Nylie year, after deducting from same the amount of said year's business which has lapsed by non-payment of premium, been canceled, or otherwise terminated up to December 31 of his third Nylie year.

For his 5th year of continuous membership in Nylie the monthly income shall be equal to 25 cents per thousand on the amount of business procured and paid for, as above, during his third Nylie year, after deducting from same the amount of said year's business which has lapsed by non-payment of premium, been canceled, or otherwise terminated up to December 31 of his fourth Nylie year. [48]

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ILLUSTRATION OF MONTHLY INCOME TO FRESHMAN NYLICIS AFTER
TWO YEARS' SERVICE

| Amounts assumed for illustration, to have been written during years of Freshman period stated | Amounts assumed, for illustration to have terminated on or before Dec. 31 of years stated, in accordance with the terms contained herein | Net amounts on which to base income of 25 cents per thousand | Monthly income for year of service stated below (for illustration) |
|---|--|--|--|
| 1st year, \$100,000 | 2d year, \$10,000 | \$ 90,000 | 3d Year, \$22.50 per month |
| 2d " 122,000 | 3d " 12,000 | 110,000 | 4th Year, \$27.50 per month |
| 3d " 140,000 | 4th " 20,000 | 120,000 | 5th Year, \$30.00 per month |

Dec. 31

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NYLICS OF THE FIRST DEGREE

Any agent who completes the period of service required by Freshman Nylics shall thereupon become a Nylic of the First Degree.

Nylics of the First Degree shall receive, subject to all the rules of Nylic, monthly from the New York Life Insurance Company a sum of money as follows:

For his 6th year of continuous membership in Nylic the monthly income shall be equal to \$0.50 per thousand on the amount of business procured and paid for, as above, during his first Nylic year, after deducting from same the amount of said first Nylic year's business which has lapsed by non-payment of premium, been canceled, or otherwise terminated up to December 31 of his fifth Nylic year.

For his 7th year of continuous membership in Nylic the monthly income shall be equal to \$0.50 per thousand on the amount of business procured and paid for as above, during his second Nylic year, after deducting from same the amount of said second Nylic year's business which has lapsed by non-payment of premium, been canceled, [49] or otherwise terminated up to December 31 of his sixth Nylic year.

For his 8th year of continuous membership in Nylic the monthly income shall be equal to \$0.50 per thousand on the amount of business procured and paid for, as above, during his third Nylic year, after deducting from same the amount of said third Nylic year's business which has lapsed by

non-payment of premium, been canceled, or otherwise terminated up to December 31 of his seventh Nylic year.

For his 9th year of continuous membership in Nylic the monthly income shall be equal to \$0.50 per thousand on the amount of business procured and paid for, as above, during his fourth Nylic year, after deducting from same the amount of said fourth Nylic year's business which has lapsed by non-payment of premium, been canceled, or otherwise terminated up to December 31 of his eighth Nylic year.

For his 10th year of continuous membership in Nylic the monthly income shall be equal to \$0.50 per thousand on the amount of business procured and paid for, as above, during his fifth Nylic year, after deducting from same the amount of said fifth Nylic year's business, which has lapsed by non-payment of premium, been canceled, or otherwise terminated up to December 31 of his ninth Nylic year. [50]

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ILLUSTRATION OF MONTHLY INCOME TO
FIRST DEGREE NYLICS

| Amounts assumed, for illustration, to have been written during Freshman Degree period of agent | | Amount assumed, for illustration, to be in force on Dec. 31 5 years later, in accordance with the terms contained herein | Monthly income for year of service stated below (for illustration) |
|--|-----------|--|--|
| | | Dec. 31 | |
| 1st Year | \$100,000 | 5th Year \$ 80,000 | 6th Year \$40.00 per month |
| 2d " | 122,000 | 6th " 108,000 | 7th " 54.00 " |
| 3d " | 140,000 | 7th " 110,000 | 8th " 55.00 " |
| 4th " | 150,000 | 8th " 120,000 | 9th " 60.00 " |
| 5th " | 150,000 | 9th " 130,000 | 10th " 65.00 " |

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NYLICS OF THE SECOND DEGREE

Any agent who shall receive monthly payments during the entire period of service required of Nylics of the First Degree, shall thereupon become a Nylic of the Second Degree.

Nylics of the Second Degree shall receive, subject to all the rules of Nylic, monthly from the New York Life Insurance Company a sum of money as follows:

For his 11th year of continuous membership in nylic the monthly income shall be equal to \$0.75 per thousand on the amount of business procured and paid for as above during his sixth Nylic year, after deducting from same the amount of said sixth Nylic year's business which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to December 31 of his tenth Nylic year.

For his 12th year of continuous membership in Nylic the monthly income shall be equal to \$0.75 per thousand on the amount of business procured and paid for as above during his seventh Nylic year, after deducting from same the amount of said seventh Nylic year's business which has lapsed by non-payment of premium, been [51] canceled, matured, or otherwise terminated, up to December 31 of his eleventh Nylic year.

For his 13th year of continuous membership in Nylic the monthly income shall be equal to \$0.75 per thousand on the amount of business procured

and paid for as above during his eighth Nylie year, after deducting from same the amount of said eighth Nylie year's business which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to December 31 of his twelfth Nylie year.

For his 14th year of continuous membership in Nylie the monthly income shall be equal to \$0.75 per thousand on the amount of business procured and paid for as above during his ninth Nylie year, after deducting from same the amount of said ninth Nylie year's business which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to December 31 of his thirteenth Nylie year.

For his 15th year of continuous membership in Nylie the monthly income shall be equal to \$0.75 per thousand on the amount of business procured and paid for as above during his tenth Nylie year, after deducting from same the amount of said tenth Nylie year's business, which has lapsed by non-payment of premiums, been canceled, matured, or otherwise terminated up to December 31 of his fourteenth Nylie year. [52]

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ILLUSTRATION OF MONTHLY INCOME TO
SECOND DEGREE NYLICS

| Amounts assumed for illustration, to have been written during First Degree period of agent | Dec. 31 | Amounts assumed for illustration, to be in force on Dec. 31, 5 years later, in accordance with the terms contained herein | Monthly income for year of service stated below (for illustration) |
|--|---------------------|---|--|
| 6th Year \$100,000 | 10th Year \$ 80,000 | 11th Year \$60.00 per month | |
| 7th " 122,000 | 11th " 108,000 | 12th " 81.00 per month | |
| 8th " 140,000 | 12th " 110,000 | 13th " 82.50 per month | |
| 9th " 150,000 | 13th " 120,000 | 14th " 90.00 per month | |
| 10th " 150,000 | 14th " 130,000 | 15th " 97.50 per month | |

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NYLICS OF THE THIRD DEGREE

Any agent who shall receive monthly payments during the entire period of service required of Nylics of the Second Degree, shall thereupon become a Nylic of the Third Degree.

Nylics of the Third Degree shall receive, subject to all the rules of Nylic monthly from the New York Life Insurance Company a sum of money as follows:

For his 16th year of continuous membership in Nylic the monthly income shall be equal to \$1.00 per thousand of the amount of business procured and paid for as above during his eleventh Nylic year, after deducting from same the amount of said eleventh Nylic year's business which has lapsed

by non-payment of premium, been canceled, matured, or otherwise terminated up to December 31 of his fifteenth Nylic year.

For his 17th year of continuous membership in Nylic the montly income shall be equal to \$1.00 per thousand on the amount of business procured and paid for as above during his twelfth Nylic year, after deducting from same the amount of said twelfth Nylic year's [53] business which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to December 31 of his sixteenth Nylic year.

For his 18th year of continuous membership in Nylic the monthly income shall be equal to \$1.00 per thousand on the amount of business procured and paid for as above during his thirteenth Nylic year, after deducting from same the amount of said thirteenth Nylic year's business which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to December 31 of his seventeenth Nylic year.

For his 19th year of continuous membership in Nylic the monthly income shall be equal to \$1.00 per thousand on the amount of business procured and paid for as above during his fourteenth Nylic year, after deducting from same amount of said fourteenth Nylic year's business which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to December 31 of his eighteenth Nylic year.

For his 20th year of continuous membership in Nylic the monthly income shall be equal to \$1.00

per thousand on the amount of business procured and paid for as above during his fifteenth Nylic year, after deducting from same the amount of said fifteenth Nylic year's business which has lapsed by non-payment of premium, been canceled, matured, or otherwise terminated up to December 31 of his Nineteenth Nylic year. [54]

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ILLUSTRATION OF MONTHLY INCOME TO THIRD DEGREE NYLICS

| Amounts assumed, for illustration, to have been written during Second Degree period of agent | | Amounts assumed, for illustration, to be in force on Dec. 31, 5 years later, in accordance with the terms contained herein | | Monthly income or year of service stated below (for illustration) | |
|--|-----------|--|-----------|---|-----------------------|
| | | Dec. 31 | | | |
| 11th Year | \$100,000 | 15th Year | \$ 80,000 | 16th Year | \$ 80.00 per month |
| 12th " | 122,000 | 16th " | 108,000 | 17th " | 108.00 per month |
| 13th " | 140.00 | 17th " | 110,000 | 18th " | 110.00 per month |
| 14th " | 150,000 | 18th " | 120,000 | 19th " | 120.00 per month |
| 15th " | 150,000 | 19th " | 130,000 | 20th " | 130.00 per month |

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SENIOR NYLICS

Senior Nylics shall receive so long as they live, provided only that they shall not enter the service of any other life insurance company, monthly payments as follows:

The basis of business for incomes for the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th,

18th, 19th and 20th years of continuous Nylic membership will be added together and divided by 15. The sum thus obtained will then be averaged with the amount of new business written and placed under the conditions provided above during that year of service as a Third Degree Nylic in which his production was smallest, after deducting from same the amount of business placed during said smallest year which has lapsed, by non-payment of premium, been canceled, or otherwise terminated up to December 31 of his twentieth Nylic year. His monthly income as a Senior Nylic shall be \$0.75 per thousand on the average, or amount, thus obtained.

[55]

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ILLUSTRATION OF MONTHLY INCOME TO SENIOR NYLICS

| BASIS OF INCOME For the Year Stated | | RECORD While a Third Degree Nylic | |
|--|-----------|---|---|
| 6th | \$ 80,000 | | |
| 7th | 108,000 | | |
| 8th | 110,000 | Amounts assumed to be procured during Third Degree period | Amount assumed to be in force on Dec. 31 of the 20th Nylic year from the smallest year's business |
| 9th | 120,000 | | |
| 10th | 130,000 | | |
| 11th | 80,000 | | |
| 12th | 108,000 | | |
| 13th | 110,000 | | |
| 14th | 120,000 | | |
| 15th | 130,000 | | |
| 16th | 80,000 | \$124,000 | \$80,000 |
| 17th | 108,000 | 135,000 | |
| 18th | 110,000 | 116,000 | |
| 19th | 120,000 | 90,000 | |
| 20th | 130,000 | 140,000 | |

| | |
|---|-------------|
| Total of sums used as basis for income from 6th to 20th year | \$1,644,000 |
|---|-------------|

| | |
|---------------------------|---------|
| Divided by 15)1,644,000(= | 109,600 |
|---------------------------|---------|

144

135

 90

90

| | |
|--|--------|
| Amount in force Dec. 31 of 20th Nylie year of smallest year of 3d degree..... | 80,000 |
|--|--------|

| | |
|------------|------------|
| Total..... | \$ 189,600 |
|------------|------------|

Average = \$94,800

75c per \$1,000 = \$71.10 monthly income for life

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PHYSICAL INCAPACITY

Any agent who is a Drawing Nylie becoming physically incapacitated for work of any kind, shall, having established the fact of such total disability to the Company's satisfaction, receive monthly an amount equal to the average monthly payments he has received from the beginning of the "degree" of which he is a member at the time of such disability, said monthly payments to be continued to him during the continuance of the disability (satisfactory [56] proof of the continuance thereof to be furnished the Company from time to time, on demand), not, however, to exceed a period of five years in all; and at the end of such period, all further payments to such agent on account of Nylie shall cease. If such agent should recover from

such disability and resume work as agent for the Company, the Company shall, at its option, make such adjustment of his position in Nylie as shall, in its judgment, seem fair and right.

GENERAL RULES

I. Every Nylie, except Senior Nylies, must devote his entire time, talents and energies to the service of the New York Life Insurance Company in soliciting personally for business. A Nylie can have no other business or occupation for profit or gain.

II. No agent, except a Senior Nylie, can continue to be a member of Nylie, who, in addition to devoting his entire time, talents and energies to the Company, does not produce each and every year on other lives than his own, at least \$50,000 of insurance (Term and Child's and Pure Endowments excepted) upon which one full year's premium in due course of business is paid.

III. Term insurance and Child's and Pure Endowments shall not count in any way in Nylie. Instalment insurance counts for its commuted value only. Insurance on an agent's own life, if same is written in accordance with the rules herein contained, will count in Nylie, provided same is not required to bring the amount up to the qualifying mark in any year.

IV. Business written by the collection of a quarterly or semi-annual premium will ultimately be counted, provided sufficient subsequent premiums thereon are collected to cover one year's insurance.

Any business which lapses before this has been done will not be counted.

V. Strictly personal business only will be allowed to count in Nylie. If a case is written personally by an agent, and part of his commission is allowed another party, proper deduction will be made. Thus, if an agent pays out one-third of his commission [57] in this way, the business thus procured will only count for two-thirds of its face value. If, on the other hand, an agent is given a case and does not help write the business personally, he will not receive any credit whatsoever for same, no matter what portion of his commission he allows to the party who writes the business.

VI. No salaried employe and no person receiving a salary for a part or all of his time can be a member of Nylie.

VII. No agency director, manager, nor general agent in control of a territory, nor agent having sub-agents, can be a Nylie.

VIII. The Company may, at its discretion, where it is convinced that the rules of Nylie in an individual case—because of special conditions or peculiarities surrounding the case—act unfairly upon a member of Nylie, make such exceptions in his behalf to the Nylie rules as it deems advisable. The making of such exceptions shall not thereafter act as a waiver of the rules and conditions of Nylie.

IX. The Company will, for a period of six months, pay to any beneficiary designated in writing by the agent and filed with the Company at its

Home Office, or, in lieu of such designated beneficiary, to the estate of any Nylie in good and regular standing in the First, Second or Third Degree, or Senior Nylie, upon his decease, whatever monthly income on account of Nylie the deceased may have been drawing at the time of his death.

X. Any member of Nylie becoming incapacitated for work of any kind on account of temporary illness may, upon establishing to the Company's satisfaction the fact that said temporary illness was of such a character as to prevent his qualifying as a Nylie member for said year, have said year entirely eliminated from his Nylie record, leaving his future Nylie status to be adjusted by the Company accordingly, or, at the option of the Company, have said year counted in Nylie, taking the actual paid business of said year as a basis for future Nylie payments depending on said year [58]

XI. Any Nylie who shall in any calendar year pay for less than \$50,000 of new insurance in accordance with these rules, shall thereby cease to be a member of Nylie, and all claim to time credit or to any further payments from the Company on account of Nylie shall thereupon and thereafter be void and of no effect. The Company may cancel and terminate any agent's membership in Nylie and all benefits thereunder for violation of any Nylie rule or of any rule or regulation of the Company.

XII. The termination of an agent's contract and agency, prior to his becoming a Senior Nylie,

or the removal or transfer of an agent, prior to becoming a Senior Nylie, to any country where the Nylie benefits have not been extended by the Company to its agents, terminates his Nylie membership and all his Nylie rights.

XIII. The Company shall have a paramount lien upon all sums payable under Nylie to secure the payment of any indebtedness of the agent to the Company, and may apply any sums becoming due directly toward the liquidation of any such indebtedness, but its failure so to apply it shall not be deemed a waiver of its lien on other sums becoming due or impair its right to apply such sums toward the liquidation of any such indebtedness.

XIV. The benefits of Nylie are not assignable without written consent of the Company given by an executive officer.

XV. This publication is issued subject to all the rules and regulations of the Company that govern the conduct of its business.

XVI. The Company reserves the right in its discretion, at any time and from time to time, to alter, amend or repeal any and all of the rules and conditions of Nylie as herein expressed by later editions of this publication. Provided, however, such changes shall be effective as to future business only. No change shall be made in the amount of business which a member, under these rules, in good standing, shall be required to write to maintain membership, nor in the basis of the Nylie compensation of such member [59]

1-F July, 1910

EXHIBIT "C"

This Agreement, made this seventeenth day of August in the year 1910 by and between the New-York Life Insurance Company, as party of the first part, and Frederick C. Moser of Seattle in the County of King and State of Washington, as party of the second part, Witnesseth,—

That said parties, in consideration of the mutual covenants and agreements herein contained, hereby mutually covenant and agree with each other, as follows, to wit:

That said first party hereby appoints said second party its special Agent for the purpose of canvassing for applications for insurance on the lives of individuals, and of performing such other duties in connection therewith as the Officers of said first party may in writing expressly require of him, and that this appointment is made upon the following terms, conditions and agreements:

1st. It is agreed that said second party shall have no authority for or on behalf of said first party to accept risks of any kind, to make, modify or discharge contracts, to extend the time for paying any premium, to bind the Company by any statement, promise or representation, to waive forfeitures or any of the Company's rights or customary requirements, to name any extra premium for extra risks or privileges, to receive any moneys due or to become due to said first party except upon applications obtained by or through him and then only in exchange for the coupon receipt attached to

the application corresponding in date and number with the application or upon policies or renewal receipts signed by the President, a Vice-President, a Secretary, or the Treasurer, sent to him by the first party for collection.

2d. It is agreed that the second party as such agent shall devote his best talents and energies to the business of this appointment, shall promptly deliver to the first party all applications for insurance upon the Annual Dividend Plan taken or obtained by him whether the medical examiner has reported thereon favorably or unfavorably, and shall strictly observe each and all the rules, regulations, and requirements contained in the first party's book of "Instructions to Agents" issued from time to time, and such special instructions as may from time to time be given to him by any officer of the first party.

3d. It is agreed that the second party shall keep regular and accurate accounts of all transactions under this appointment, and, whenever required by the first party or its authorized agent, shall transmit to the first party a report in detail, embracing every item of business done by or through him and a statement of all moneys collected or received by or through him or on account of said first party.

4th. It is agreed that all books of account, documents, vouchers, and other books or papers whatsoever connected with the business of this appointment, shall be the property of the first party, whether paid for by it or not, and at any and all times shall be open to the first party or its repre-

representative for the purpose of examination, and shall be turned over to the first party or its [60] representative on its order at the termination of this appointment,—provided, however, that no entry contained in any book of account or other document made or kept by said second party shall be binding on the first party, nor shall any such entry be used as evidence in any dispute between said parties unless the same shall have been first duly examined and approved by the authorized representative of the first party.

5th. It is agreed that all moneys received by the second party for or on behalf of the first party, shall be securely held by him as a fiduciary trust and shall not be used by him for any personal or other purpose whatsoever, but shall be by him immediately paid over to the first party; and that if the second party shall withhold any money, policies, or receipts belonging to the first party after the same have been reported or transmitted to said first party, or if he shall withhold any money, policies, or receipts after they shall have been by it demanded from him, such dereliction shall immediately and without further notice work an unconditional forfeiture of all claims and demands whatsoever accrued or to accrue under this or any previous agreement, but nothing herein contained shall be construed to affect any rights or claims of said first party against said second party.

6th. It is agreed that the district within which said second party shall have permission to operate is such portions of the State of Washington or

such other territory as the first party may direct from time to time, and that the second party shall report his business through the first party's Seattle Branch Office.

7th. It is agreed that said second party shall thoroughly and ably canvass said district; that the first party may, at its option, employ other Agents in said district, and that the second party shall have no claim for commissions or other remuneration on the business effected by such other Agent or Agents so employed.

8th. It is agreed that if in any case the first party shall deem it proper, in consequence of misrepresentations claimed to have been made or misunderstandings had at or before the time of the delivery of a policy, to cancel the policy and return the premiums thereon or any part thereof, the second party shall in such case lose all right to commissions thereon, and shall repay to the first party, on demand, the amount of commissions received on account of such policy.

9th. It is agreed that said second party shall collect from time to time and promptly remit to the first party all renewal premiums which the first party may authorize him to collect by delivering to him for that purpose the Company's official renewal receipt, but not otherwise.

10th. It is agreed that the necessary expenses for medical examinations (except as provided in Section 17th hereof and in the Company's book of "Instructions to Agents"), for expressage on docu-

ments and other things sent by the first party to the second party, shall be paid by the first party, and that the first party shall furnish to the second party such a supply of blanks and circulars as it shall deem reasonable; but the first party shall be liable to pay no charge other than as herein stated, or as shall hereafter be allowed in writing by the first party.

11th. It is agreed that the first party shall have, and it is hereby given, a lien upon any commissions or claims for commissions under this or any prior agreement as security for the payment of any claims due or to become due to said first party from said second party. [61]

12th. It is agreed that the second party shall not enter the service of, or place any applications for Annual Dividend insurance with, any other life insurance company, without the consent in writing of the first party.

13th. It is agreed that the first party's ledger account with said second party shall at all times be competent and conclusive evidence of the state of the account between the parties hereto, and shall constitute a mutual estoppel as between them. In consideration of the last above agreement in this paragraph contained, the first party agrees to furnish to the second party a copy of his said ledger account, not oftener, however, than once a month, upon receipt of written request therefor, due allowance to be made, however, for clerical delays in furnishing the same, and if one copy of his ledger account has been furnished him, any subsequent

copy may consist only of the additional ledger entries made since the date of such copy, or may consist only of the additional ledger entries made since the date of the last copy of additional ledger entries furnished him.

14th. It is agreed that said second party shall keep deposited with the first party a bond for a satisfactory amount, with satisfactory sureties, conditioned for the faithful performance of his duties as such agent.

15th. It is agreed that in case any other special agent or person acting for the first party shall obtain any business jointly with him, the commission hereinafter provided shall be divided equally between the parties hereto, unless otherwise expressly agreed in writing; that when policies are returned for change and an allowance made on the old policy which is applied to the payment of the premium on the new, no commission shall be allowed on the amount thus transferred from the old to the new policy, and that the commission provided in Section 20 shall not apply when the insured is over sixty years of age.

16th. It is agreed that if the second party shall sell or offer to sell, directly or indirectly, to any person or persons, policies for insurance to be issued by said first party, at any reduction from the regular Table rates as furnished to said second party by the first party, said sale or offer of sale shall work an immediate termination of this agreement and a forfeiture of all rights and claims arising on account of it without altering or impairing

any rights or claims of said first party against said second party.

17th. It is agreed that, in case a policy issued as applied for shall be subsequently returned as "not taken", the second party shall pay to the first party such sum of money as shall cover all fees and expenses connected with issuing such policy.

18th. It is agreed that either party hereto may without cause terminate this agreement upon thirty days' written notice.

19th. It is expressly understood and agreed that this agreement shall be considered strictly confidential, and that under no circumstances shall said second party mention or exhibit the terms thereof to any person or persons.

20th. It is agreed that the first party shall pay and the second party receive under this agreement the following compensation only unless otherwise agreed in writing, to wit:

A. A commission on the premium for the first year of insur- [62] ance, which shall be paid in cash to and received by the first party upon policies of insurance effected with said first party upon the lives of persons whose written applications therefor were obtained by or through the second party, issued at ages sixty and under, at and after the following rates,—

| | |
|--|--------------|
| A. Ordinary Life and Endowments paid by 40 annual premiums | 55 per cent. |
| B. Limited-payment Life policies paid by 20 or more annual premiums and Endowments paid by 35 annual premiums | 50 per cent. |
| C. Fifteen-payment Life and Endowments paid by 30 annual premiums | 45 per cent. |
| D. Endowments paid by 25 annual premiums..... | 40 per cent. |
| E. Endowments paid by 20 annual premiums..... | 35 per cent. |
| F. Endowments paid by 15 annual premiums..... | 30 per cent. |
| G. Endowments paid by 10 annual premiums..... | 20 per cent. |
| H. Ten-payment Life policies | 40 per cent. |
| I. Pure Endowments on lives of Adults; Pure Endowments on lives of children payable at age 25 or under; and Ten-, Fifteen and Twenty-Year Child's Endowments, Exchangeable at age 15 | 15 per cent. |
| J. Five-year Term policies | 30 per cent. |
| K. Ten-year, or longer, Term policies | 30 per cent. |

B. On all annuities paid by single premiums and on all single premium policies the compensation shall be a commission of 3% on said single premium.

C. On all annuities not included in the last above paragraph "B", the compensation shall be such as the Company shall allow in writing in each specific case.

D. On all forms of insurance and for all ages not included in the above paragraphs "A", "B" and "C" hereof, the compensation shall be such percentum of the premium received for the first year of insurance as will yield in amount a sum equal to 50% of the premium for the first year of insurance on an Ordinary Life policy of the same amount and at the same age, but no renewal commission thereon shall be allowed.

E. A single renewal commission on the premium for the second year of insurance or part thereof, which shall be paid in cash to and received by the first party upon said policies of insurance described in the above paragraph "A", based upon the efficiency of service of the second party, and subject to all the terms and conditions of this contract and especially of sections 5th and 16th thereof, as follows, to wit:

(a) Five per cent. on policies designated in said paragraph [63] "A" as A, B, C, D, E and H, and Four per cent. on policies designated therein as F, and Three per cent. on policies designated therein as G, I and K, and Two per cent. on policies designated therein as J, provided the total volume of new insurance obtained by or through the second party on all ~~the plans described in said paragraph "A"~~, the applications for which were written and the medical examinations made during any twelve calendar months ending on the thirty-first day of December, each year, upon which the policies were delivered and the premium for one insurance year paid in cash to and received by the first party during said twelve months or within sixty days thereafter (policies upon which less than one full insurance year's premiums were paid as above to count pro rata), amounts to \$20,000 or over, said renewal commission to be on said policies of each such twelve calendar months period only and to be in lieu of all other renewal commissions; or,

(b) Ten per cent on policies designated in said paragraph "A" as A, B, C, D, E and H, and Eight

per cent. on policies designated therein as F, and Six per cent. on policies designated therein as G, I and K, and Four per cent. on policies designated therein as J, provided the total volume of said new insurance amounts to \$30,000 or over, said renewal commissions to be on said policies of each such twelve calendar months period only and to be in lieu of all other renewal commissions; or,

(c) Fifteen per cent. on policies designated in said paragraph "A" as A,B,C,D and E, and Fourteen per cent. on policies designated therein as H, and Twelve per cent. on policies designated therein as F, and nine per cent. on policies designated therein as G, I and K, and Six per cent. on policies designated therein as J, provided the total volume of said new insurance amounts to \$40,000 or over, said renewal commission to be on said policies of each such twelve calendar months period only and to be in lieu of all other renewal commissions.

21st. It is agreed that in the event of the termination of this agreement by the death of the second party all commissions provided for in this contract shall, as they accrue thereafter, be credited to the account of the second party with the first party, and be payable to his executors, administrators or assigns, less any indebtedness to the first party.

22d. It is agreed that this agreement shall take effect on the first day of January 1911, if duly signed by the second party and countersigned on behalf of the first party by its Contract Registrar at its Home Office, and by one of its Agency Direc-

tors, Supervisors or Inspectors of Agencies. It is agreed in consideration of this agreement that all previous agreements between the parties hereto are hereby cancelled as of the date this agreement takes effect.

In Witness Whereof, the parties to this agreement have subscribed their name to duplicate copies hereof the day and year first above written.

NEW-YORK LIFE INSUR-
ANCE COMPANY,

By THOS. A. BUCKNER.

Vice-President

F. C. MOSER

Countersigned by

E. A. LEWIS

Contract Registrar.

S. SETON LINDSAY

A. D. [64]

In the District Court of the United States
For the Western District of Washington,
Northern Division.

File No. 901
Civil Action

F. C. MOSER,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Defendant.

ORDER DISMISSING PLAINTIFF'S ACTION

The above entitled action this day came on regularly to be heard upon the motion of the above named defendant to dismiss said action upon the grounds that in the complaint, as supplemented by plaintiffs bill of particulars, plaintiff fails to state a claim upon which relief can be granted and that it appears conclusively from the allegations thereof that the action alleged is barred by the statute of limitations of the State of Washington and by laches on the part of the plaintiff, and the parties having heretofore duly and regularly filed briefs in support of their respective positions and the Court having heard oral arguments by Clarence J. Coleman, Esq., on behalf of plaintiff and Clarence R. Innis, Esq. on behalf of defendant, and being in all respects fully advised, it is by the Court

Ordered, Adjudged And Decreed that the said

motion be and the same is hereby granted and the said action be and the same is hereby dismissed with prejudice to any subsequent suit or action upon said claim, and that defendant have and recover of plaintiff its costs.

To which ruling plaintiff excepted and said exception is by the Court allowed.

Done In Open Court this 11th day of July, 1944.

LLOYD L. BLACK

United States District Judge.

CLARENCE R. INNIS

Attorney for Defendant

Approved As To Form:

CLARENCE J. COLEMAN,

Attorney for Plaintiff

[Endorsed]: Filed Sep. 11 1944. [65]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the defendant, New York Life Insurance Company, a corporation, and to Clarence R. Innis, its attorney:

Notice Is Hereby Given that F. C. Moser, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Ninth District from

the order and judgment of dismissal entered in this action September 11, 1944.

F. C. MOSER

By CLAYTON BOLLINGER

CLARENCE J. COLEMAN

Attorneys for Plaintiff, 415
First National Bank Building,
Everett, Washington.

[Endorsed]: Filed Oct 10 1944. [66]

[Title of District Court and Cause.]

COST BOND

Know All Men By These Presents, that we, F. C. Moser, as principal and Sun Indemnity Company a corporation as sureties, are held and firmly bound unto New York Life Insurance Company, a corporation, in the full and just sum of Two Hundred and Fifty (\$250.00) Dollars, to be paid to the said New York Life Insurance Company, a corporation, its successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Scaled with our seals, and dated this 9th day of October, 1944.

Whereas, lately, at the May 1944 term of the District Court of the United States for the Western District of Washington, Northern Division, in a suit depending in said court between F. C. Moser,

plaintiff, and New York Life Insurance Company, a corporation, defendant, order and judgment of dismissal was rendered against the said plaintiff, at the May 1944 term of court, and the said plaintiff has filed his notice of appeal from said judgment and order of dismissal to the Circuit Court of Appeals for the 9th District.

Now, the condition of the above obligation is such that if the said F. C. Moser shall prosecute said appeal to effect, and [67] answer all costs, and if he fails to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

F. C. MOSER

Appellant

[Seal]

SUN INDEMNITY CO.

By CARL T. VENNIGERHOLTZ

[Endorsed]: Filed Oct. 10 1944. [68]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL.

To the Clerk of the above entitled Court:

You will please prepare transcript of the entire record in the above entitled cause to be filed with the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit under notice of appeal which was filed in your office on the 10th day of October, 1944, and include

in such transcript the following pleadings, proceedings and papers, to-wit:

1. Transcript on removal
2. Defendant's appearance
3. Bond.
4. Notice
5. Defendant's Motion to Dismiss.
6. Defendant's Motion to make more definite and certain.
7. Plaintiff's Appearance
8. Notice.
9. Original Summons and Complaint.
10. Order dated July 3, 1944.
11. Second Order dated July 3, 1944.
12. Plaintiff's Bill of Particulars.
13. Order of Dismissal.
14. Notice of Appeal to the Circuit Court of Appeals.
15. Bond.
16. Designation of Portions of the record to be contained [69] in the record on appeal.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

CLAYTON BOLLINGER

CLARENCE J. COLEMAN

Attorneys for Plaintiff. F. C.
Moser.

[Endorsed]: Filed Oct 24 1944. [70]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD

United States of America,
Western District of Washington—ss.

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 70, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by designations of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same, constitute the record on appeal herein from the Order of Dismissal dated July 11, 1944, of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerks' fees (Act of Feb. 11, 1925) for making record, certificate or return, 36 folios
at 15c\$ 5.40
158 folios at 5c..... 7.90

| | |
|--|----------|
| Appeal fee (Sec. 5 of Act) | 5.00 |
| Certificate of Clerk to Transcript | .50 |
| Total | \$ 18.80 |

I hereby certify that the above costs in the sum of \$18.80 have been paid to me by the attorney for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, this 15 day of November, 1944.

[Seal] JUDSON W. SHORETT,
 Clerk,
 By TRUMAN EGGER,
 Chief Deputy

[Endorsed]: No. 10925. United States Circuit Court of Appeals for the Ninth Circuit. *F. C. Moser*, Appellant. vs. *New York Life Insurance Company*, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed November 20, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10925

F. C. MOSER,

Appellant,

vs.

NEW YORK LIFE INSURANCE CO.,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON AND DESIGNATION OF THE
PARTS OF THE RECORD TO BE
PRINTED

Comes now F. C. Moser, the appellant in the above-entitled cause, and states that the points upon which he intends to rely in this court in this case are as follows:

1. The court erred in sustaining appellee's motion to dismiss appellant's complaint.
2. The court erred in holding that the cause of action alleged in appellant's complaint was barred by the Statute of Limitations.
3. The court erred in entering an order dismissing appellant's action with prejudice.

Appellant further states that the whole of the record, as filed, is necessary for a consideration of the case.

Dated December 15, 1944.

CLAYTON BOLLINGER

CLARENCE J. COLEMAN

Attorneys for Appellant

(Affidavit of mailing attached.)

[Endorsed]: Filed Dec. 18, 1944. Paul P. O'Brien, Clerk.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

F. C. MOSER,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

RAYMOND G. WRIGHT

CLARENCE R. INNIS

ARTHUR E. SIMON

Attorneys for Appellee.

Of
WRIGHT, INNIS & SIMON
1020 1411 Fourth Avenue Building,
Seattle, Washington.

FILED

APR 12 1945



IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

F. C. MOSER,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
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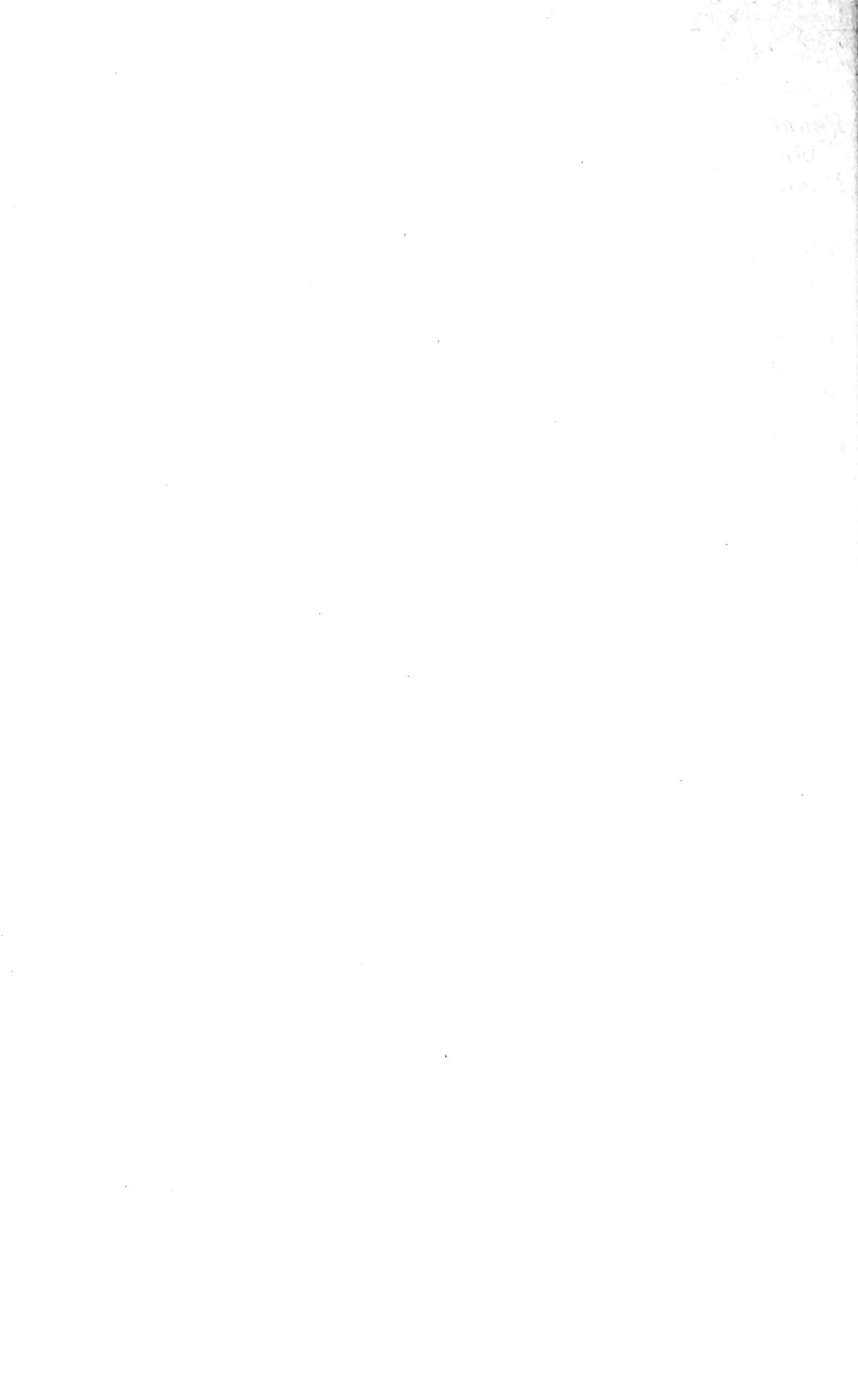
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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

F. C. MOSER,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellee.

} No. 10925

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

DECISION BELOW

After requiring appellant (plaintiff below) to serve and file a bill of particulars (R. 33) the court granted the motion of appellee (defendant below) to dismiss appellant's action (R. 16) and entered an order or judgment dismissing the same (R. 80).

This dismissal was not based solely upon the ground that appellant's action was barred by the statute of limitations and laches, as seems to be the view of appellant (appellant's brief 3). The dismissal, as shown by the order (R. 80), was upon all the grounds stated in the motion to dismiss, namely, that in the complaint plaintiff (appellant) failed to state a claim upon which relief could be granted because (1) plaintiff

failed to allege facts sufficient to state such a claim, and (2) it appears affirmatively from the allegations thereof that the action alleged, if any, was barred by the statute of limitations of the State of Washington and by laches on the part of plaintiff.

STATEMENT OF THE CASE

It is believed that an analysis of the allegations of the complaint, as supplemented by the bill of particulars, which became a part thereof pursuant to Rule 12(e) of the Federal Rules of Civil Procedure, will be of aid to the court in its consideration of the position of appellee and the decision of the District Court.

In the complaint (Par. III, R. 24) it is alleged that during the period from October 7, 1907, to and including August 22, 1936, plaintiff was "a special agent of the defendant corporation for the purpose of canvassing for applications for life insurance and annuities and performing such other duties as might be required of him by the terms of his contract of employment with the defendant corporation consisting of agency agreements and Nylic."

It is alleged (Par. IV, R. 24) that on or about January 1, 1908, plaintiff entered into a contract with the defendant "wherein the plaintiff was to employ his full time as a soliciting life insurance agent for the defendant, which agreement provided for compensation to the plaintiff of nine (9) renewals of five (5) per cent each, or a total renewal commission of forty-five (45) per cent."

This agreement is annexed to plaintiff's bill of particulars as Exhibit A (R. 37-46).

Under this agreement on policies of life insurance issued by defendant on applications secured by plaintiff, he would receive as a renewal commission five (5) per cent of the annual premium paid by the policy holder during the second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth years that the policy remained in force (R. 44, 45).

It was alleged (Par. V, R. 24, 25) that during the year 1910 defendant established for its life insurance soliciting agents a "dual agency system" consisting of "Nylic" and a single agency agreement; that "Nylic" is a system which embraces two periods, the first period of twenty (20) years designated by the defendant as the "Qualifying Nylic Period" and the lifetime period thereafter designated by the defendant as the "Senior Nylic Period."

It was charged (Par. VI, R. 25, 35) that during 1910 defendant represented to plaintiff that under the defendant's alleged "dual agency system" the compensation which plaintiff would receive as *renewal commissions* on policies of life insurance issued on applications procured by plaintiff and as Nylic payments, *during plaintiff's qualifying Nylic period of 17 years, expiring January 1, 1928*, would be the "equal of forty-five (45) per cent in renewals provided for in the said agreement dated January 1, 1908," which is Plaintiff's Exhibit A.

From the bill of particulars it appears that all of the said representations were oral. None of them was in writing (R. 34). The latest date upon which any of the alleged oral representations was made was in the year 1910 (R. 35).

It was alleged (Par. VII, R. 25) that relying upon said representations plaintiff surrendered said contract dated January 1, 1908, and signed and accepted an agency agreement dated August 17, 1910, and a "Nylic" contract, "both to become simultaneously effective on January 1, 1911."

The said agency agreement of August 17, 1910, is a part of plaintiff's bill of particulars and is annexed thereto as plaintiff's Exhibit C (R. 69).

The alleged "Nylic" contract is a part of plaintiff's bill of particulars and is annexed thereto as plaintiff's Exhibit B (R. 47).

It was charged (Par. VIII, R. 26) that during the period of 17 years ending January 1, 1928, plaintiff served as agent of defendant "relying upon the said defendant's representations as to the amount of compensation to be paid plaintiff by the defendant thereunder."

Plaintiff then alleged (Par. IX, R. 26) "that said representations were false and fraudulent in that the plaintiff actually received during said period (January 1, 1911 to January 1, 1928) from the defendant under said dual agency system \$52,171.45 in renewal commissions and \$56,498.95 in 'Nylic' payments, or a total dual agency payment of \$108,709.82;" that if plaintiff had received during said period renewal commissions computed in accordance with the provisions of the single agency agreement of January 1, 1908 (plaintiff's Exhibit A) plaintiff would have been paid \$156,514.35 "in renewal commissions;" and that "by reason of the premises defendant has wrongfully de-

frauded plaintiff out of the sum of \$47,804.53," for which amount, with interest at the legal rate, plaintiff seeks judgment against defendant.

It appears from the bill of particulars that of the sum of \$52,171.54 which plaintiff alleges (Par. IX) he received as renewal commissions pursuant to the agency agreement of August 17, 1910 (Exhibit C) plaintiff received \$49,278.66 thereof prior to January 1, 1928, and \$2892.86 after January 1, 1928, but prior to December 29, 1929 (R. 36).

It appears also from the bill of particulars that the entire sum of \$56,498.95 which plaintiff alleges (Par. IX) he received as Nyllic payments pursuant to the provisions of Nyllic 2 (plaintiff's Exhibit B) was received by plaintiff prior to January 1, 1928 (R. 36).

Plaintiff charged (Par. X, R. 26) that the defendant "made all calculations, handled all funds and made all the payments on compensation that was due based on its own calculations; that the plaintiff reposed great confidence in the defendant and its methods of business and that a fiduciary relationship existed between the parties and that as a result of plaintiff's trust as to the manner of the operations of defendant plaintiff did not discover that said representations as to the amount of his compensation were falsely and fraudulently made to him, and that plaintiff did not discover that such representations were false and fraudulent until within a period of at least a year from the date hereof." This obviously means the date upon which the complaint was subscribed and sworn to by plaintiff. This date is February 11, 1944 (R. 27).

Plaintiff's summons and complaint in this action

were served upon defendant on February 14, 1944 (R. 3).

In the agency agreement dated August 17, 1910 (plaintiff's Exhibit C, R. 69, 77) the renewal commissions payable to plaintiff during the 17-year period beginning January 1, 1911, and ending December 31, 1927, are specifically set forth.

Likewise, in Nylic 2 (plaintiff's Exhibit B; R. 47) the Nylic payments payable to plaintiff during the 17 year period commencing January 1, 1911 and ending December 31, 1927, are specifically set forth. These Nylic payments are in addition to the commissions payable to plaintiff under the agency agreement of August 17, 1910 (plaintiff's Exhibit C).

It also appears from an examination of Nylic 2 (plaintiff's Exhibit B) that in addition to the Nylic payments of \$56,498.95 which plaintiff alleges (Par. IX, R. 26) he received during the period of 17 years commencing January 1, 1911, and ending January 1, 1928, plaintiff, by reason of attaining the degree of Senior Nylic, earned and was entitled to receive for life monthly payments, commencing January 1, 1928, computed in accordance with the formula set forth therein (R. 62, 63). Obviously, because of the large volume of business procured by plaintiff, these monthly income payments payable to plaintiff subsequent to December 31, 1927, are in a substantial amount.

In the agency agreement dated January 1, 1908 (plaintiff's Exhibit A, R. 37, 44, 45) the renewal commissions payable to plaintiff thereunder are specifically set forth.

As a summary of the facts which appear conclus-

ively from the allegations in the complaint, supplemented as they are by the bill of particulars, it is deemed appropriate to direct specific attention to the following facts:

(1) The alleged representations upon which plaintiff's action was predicated were made in 1910. None of them was in writing. All of them were oral.

(2) The sole charge is that defendant in 1910 orally represented that under the agency agreement dated August 17, 1910, and "Nylic 2" the aggregate amount which plaintiff would be entitled to receive as compensation for renewal commissions and Nylic payments during the 17 year period ending December 31, 1927, would equal the amount of the renewal commissions plaintiff would have been entitled to receive under the agency agreement dated January 1, 1908, if it were applicable throughout said 17 year period.

(3) There is no charge that at the time the alleged representations were made in 1910 defendant knew or could have known or had any reason to believe that plaintiff's renewal commissions plus Nylic payments to be made him during the said 17 year period ending December 31, 1927, could not and would not equal or exceed the amount of the renewal commissions that appellant would have received if the agency agreement of January 1, 1908, had not been surrendered and had been continued in force throughout said 17 year period.

(4) There is no charge that defendant made any false representation or even any representation of an existing fact. The oral representations alleged and relied upon by appellant, made in 1910, were in re-

spect of future renewal commissions and Nylic payments to be made during a period of 17 years ending December 31, 1927. Obviously, the amount of the renewal commissions which appellant would have received during the said 17 years if the amount thereof were computed in accordance with the provisions of the agency agreement of January 1, 1908, which was superseded by the agency agreement of August 17, 1910, could not possibly be predicted in 1910 by either appellant or appellee with any degree of accuracy. The amount would depend upon unknown factors, such, among others, as the volume and kind of business which would be produced by plaintiff, the number of years each policy issued on applications secured by plaintiff would remain in force, and the length of time plaintiff would remain in defendant's employ under the agreement of January 1, 1908. Plaintiff's knowledge in respect of these unknown factors and his capacity to evaluate them were the equal of the defendant's. Upon these same unknown factors would depend the amount of the renewal commissions and Nylic payments plaintiff would be entitled to receive under the agency agreement of August 17, 1910, and the "Nylic Contract." The latter amounts might or might not be equal to or greater than the former. Plaintiff's knowledge and capacity to evaluate these factors were also the equal of defendant's. There was no uncertainty, however, about the formula to be applied in the determination of the amount plaintiff would be entitled to receive under either of the agreements. In each of the written agreements the specific formula applicable is set forth. The computation of the amount, if one de-

sired to indulge in predictions, was nothing more than a mathematical computation in respect of which plaintiff was in no different position than was defendant. There was no charge that plaintiff was unable to read, write and subtract and multiply.

(5) There was no charge that defendant concealed from plaintiff any material fact of which defendant had knowledge. Nor is there any charge or suggestion that defendant failed to reveal all material facts of which it had knowledge.

(6) There are no facts alleged which if proved would establish that a fiduciary relationship existed between appellant and appellee, or would support appellant's alleged conclusion that "a fiduciary relationship existed between the parties." To the contrary, from the allegations in the complaint and from the agency agreements annexed to the bill of particulars it affirmatively appears that plaintiff was an agent of defendant, employed for the purpose of soliciting applications for life insurance and annuities. There is no allegation or suggestion that between the parties there was in 1910 or at any other time a professional relationship, a family tie, or anything which itself impels or induces a trusting party to relax the care and diligence which he otherwise could and ordinarily would exercise. It appears conclusively from the allegations of the complaint and from the bill of particulars that the relationship between the parties was nothing more than the usual and normal business relationship which exists between a life insurance company and any of its soliciting agents. There is not a single allegation of fact in the complaint which

suggests or would support a belief on the part of plaintiff that defendant at any time was undertaking to act for him or in his behalf.

(7) It appears affirmatively from the allegations of the complaint that plaintiff ceased to be an agent or an employee of defendant on August 22, 1936. Consequently, it affirmatively appears that any fiduciary relationship which might have existed (there was none in fact) terminated August 22, 1936, if it had not for the purposes of this case terminated on December 31, 1927.

(8) It appears affirmatively and conclusively that appellant knew during the years between January 1, 1911 and January 1, 1928, the exact amount of the renewal commissions and Nylic payments he was receiving from time to time; and that not later than December 29, 1929, appellant knew and since has known the exact amount which he had received from appellee as renewal commissions and Nylic payments during the 17-year period ending December 31, 1927.

(9) Appellant's action was not commenced until February 14, 1944.

(10) It appears conclusively from the allegations of the complaint that this is not an action for rescission.

(11) It also appears conclusively that this is not an action for a breach of the agency agreement of August 17, 1910, or of the alleged "Nylic 2" agreement. There is no charge that appellant was not paid renewal commissions and "Nylic" payments strictly in accordance with the provisions of said agreements.

SUMMARY OF ARGUMENT

There is a failure to state a claim upon which relief can be granted because basic and essential elements of a fraud action are not alleged, and it conclusively appears that there was no fraud.

Plaintiff's action was based solely upon oral representations of defendant which plaintiff alleged were false and fraudulent. The oral representations relied upon did not relate to an existing fact. They were and must reasonably be considered as a mere estimate or opinion as to something in the future. In addition, there are no facts alleged sufficient to support a charge that the representations were false, or that they were known by defendant to be false at the time plaintiff claims they were made. Nor is there any allegation of facts sufficient to support a charge that plaintiff was ignorant of their falsity. Nor are there any facts alleged to indicate that plaintiff had a right to rely upon the alleged oral representations.

To the contrary, it conclusively appears from the facts that there was no fraud. In 1910, at the time the alleged representations were made and at all times thereafter, plaintiff's information, knowledge and means of knowledge of all material facts and factors were as full and complete as were defendant's. There was no uncertainty or ambiguity about the specific formula set forth in each of the written agreements, to be applied in the computation of the amount of renewal commissions and Nylic payments to which plaintiff would be entitled. Plaintiff's ability to predict the events of the future and to evaluate the effect of such events in terms of the compensation

he would be entitled to receive under the applicable agreements was the equal of defendant's. At no time was there any concealment or misrepresentation of any material fact of which defendant had or could have had knowledge. There was no fraud.

Apart from all other considerations, there is a failure to state a claim upon which relief can be granted because it conclusively appears from the allegations of the complaint, supplemented by the bill of particulars, that plaintiff's action is barred by the statute of limitations and by laches on the part of plaintiff. The three-year statute of limitations is applicable. Plaintiff's action was not commenced until February 14, 1944, more than 33 years after the oral representations relied upon are alleged to have been made, more than 16 years after December 31, 1927, which is the end of the 17-year period here relevant, and approximately 7½ years after August 22, 1936, the date of the severance of plaintiff's employment by defendant.

Plaintiff knew from time to time during the 17-year period commencing January 1, 1911, the amount of the renewal commissions and Nylic payments he was paid in accordance with the agreements then applicable. Prior to December 30, 1929, plaintiff received all of the renewal commissions and Nylic payments he was entitled to receive under the applicable agreements. Throughout said period of 17 years ending December 31, 1927, and since, plaintiff at all times knew or could have ascertained by computations of his own, the amounts which he might have received

as renewal commissions if the agency agreement of January 1, 1908, were applicable during said period.

Under these facts which appear conclusively from the allegations of the complaint, as supplemented by the bill of particulars, appellant's action is barred by the statute of limitations because it was not commenced within three years after the cause of action, if any, accrued and within three years after discovery by appellant of the facts constituting the alleged fraud.

It also conclusively appears from the allegations of the complaint, as supplemented by the bill of particulars, that there was no fiduciary relationship between plaintiff and defendant, as asserted by plaintiff and that if there had been any such fiduciary relationship it terminated not later than August 22, 1936.

The points and authorities relied upon by plaintiff are not here applicable.

ARGUMENT

I.

There is a failure to state a claim upon which relief can be granted because basic and essential elements of a fraud action are not alleged, and it conclusively appears that there was no fraud.

Plaintiff's action was based solely upon alleged false and fraudulent oral representations of defendant. It was a fraud action. It is the position of appellee here, as it was in the District Court, that the basic and essential elements of a fraud action are not alleged, and that consequently there is a failure to state a claim upon which relief can be granted.

The essential and basic elements which must be alleged and proved to sustain a recovery in an action based upon fraud are stated in *Webster v. Romano Engineering Corp.*, 178 Wash. 118, 120, 34 P.(2d) 428, to be as follows:

“* * * But what is fraud? This court has been reluctant to circumscribe it by definition. *Knutsen v. Alitak Fish Co.*, 176 Wash. 169, 28 P.(2d) 334; *American Savings Bank & Trust Co. v. Bremerton Gas Co.*, 99 Wash. 18, 168 Pac. 775. We have, however, along with all other courts, recognized certain essential elements that enter into its composition. These are: (1) A representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage. 26 C.J., p. 1062, Sec. 6 and 7; *Grant v. Huschke*, 74 Wash. 257, 133 Pac. 447; *Raser v. Moomaw*, 78 Wash. 653, 139 Pac. 622, 51 L.R.A. (N.S.) 707; *Hamilton v. Mihills*, 92 Wash. 675, 159 Pac. 887.”

See, also:

Andrews v. Standard Lumber Co., 2 Wn. (2d) 294, 97 P.(2d) 1062.

General allegations of fraud, collusion or bad faith are insufficient in the absence of allegations of fact themselves giving rise to an inference of fraud.

Moore v. Tumwater Paper Mills Co., 181 Wash. 45, 55, 42 P.(2d) 29.

Representations which are a "*mere matter of opinion as to something in the future*" are not actionable.

Jewell v. Shell Oil Company, 172 Wash. 603, 609, 21 P.(2d) 243.

The characterization of acts as fraudulent which are not fraudulent *per se* is not sufficient. It must be made to appear by the facts alleged, independent of mere conclusions, that if the allegations are true a fraud has been committed.

Betz v. Tower Savings Bank, 185 Wash. 314, 322, 55 P.(2d) 338.

The rule is that fraud cannot be predicated upon statements promissory in their nature and relating to future actions, *nor upon the mere failure to perform a promise or an agreement to do something at a future time, or to make good subsequent conditions which have been assured*. Nor is non-performance alone evidence of fraud. In *Rankin v. Burnham*, 150 Wash. 615, 618, 274 Pac. 98, the reasons given for this rule are stated at page 618 as follows:

"The general rule is that fraud can not be predicated upon statements promissory in their nature and relating to future actions, nor upon the mere failure to perform a promise, or an agreement to do something at a future time, or to make good subsequent conditions which have been assured. Nor, it is held, is such non-performance alone even evidence of fraud. Reasons given for this rule are that a mere promise to perform an act in the future is not, in a legal sense, a representation, and a failure to perform it does not change its character. Moreover, a representation that something will be done in the future, or a promise to do it, from its nature

cannot be true or false at the time when it is made. The failure to make it good is merely a breach of contract, which must be enforced by an action on the contract, if at all. And as in the case of promises, it is generally held that mere assertions of intention, or declarations of future purpose, do not amount to fraud."

If the truth or falsity of the representation might have been tested by ordinary vigilance and attention, "it is the party's own folly if he neglected to do so."

A party whose rights rest upon a written instrument which is plain and unambiguous and who has read or had the opportunity to read the instrument cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein.

Johnston v. Spokane & Inland Empire R. Co., 104 Wash. 562, 177 Pac. 810;

Kelley v. von Herberg, 184 Wash. 165, 174, 50 P.(2d) 23;

Hubenthal v. Spokane & Inland Ry. Co., 43 Wash. 677, 685, 86 Pac. 955.

Here the first basic and required element of a fraud action is missing. The representations alleged did not relate to an existing fact. They were and must reasonably be considered as a mere estimate or opinion as to something in the future, a future covering a period of seventeen years subsequent to the date the representations are alleged to have been made. Fraud cannot be predicated upon such representations. We shall cite and quote from some of the applicable and controlling authorities.

The applicable rule is stated in *Webster v. Romano*

Engineering Corp., 178 Wash. 118, 121, 34 P.(2d) 428:

“It is quite obvious, we think, that several of these elements are lacking in the representations relied upon in the instant case. We shall discuss, however, only the first — the basic element of an action for deceit. The representation must relate to an existing fact. Speaking of this point, in *Tacoma v. Tacoma Light & Water Co.*, 16 Wash. 288, 305, 47 Pac. 738, we said:

“‘It [the representation] did not relate to a *past transaction* nor was it the statement of an existing fact. It was a mere estimate of what they would do in the future, and fraud cannot be predicated upon it.’

“See, also: *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186, L.R.A. 1916B, 1069.

“Measured by this standard, the representations relied upon by appellant cannot form the basis of an action for deceit. They are expressions of opinion about something to take place in the future, namely, what the grader would do under certain conditions. They relate neither to a past transaction nor to an existing fact.”

The established rule here applicable is also stated in *Jewell v. Shell Oil Co.*, 172 Wash. 603, 609, 21 P.(2d) 243, as follows:

“Upon the cause of action for fraud, which was withdrawn from the jury, little need be said. That cause of action was based upon claimed representations made to the respondent at the time he signed the lease that his profits, in addition to the four cents, would be a certain number of cents, and he claims that his profits were one-half cent per gallon less than it was repre-

sented they would be, and by this cause of action seeks to recover two hundred fifty dollars. The statement as to what the respondent's margin of profit would be, if it were made, was a mere matter of opinion as to something in the future, and was not actionable. *Davis v. Masonic Protective Association*, 94 Wash. 406, 162 Pac. 516. Other cases might be cited, but the rule is so well settled as not to require the multiplication of authorities. The trial court correctly withdrew from the jury this cause of action."

In *Hanlon v. Nelson*, 140 Wash. 123, 125, 248 Pac. 59, the court stated and followed one of the established rules here applicable:

"The other representation, made at the time the first tract was purchased, that the respondents had reserved the twenty-five-foot strip, amounted at the most to a promise that the respondents would, at some time, open or dedicate a street. *A promise as to something to be performed in the future, even though the promise is never fulfilled, is not fraud which entitles a party, though misled by the promise, to recover damages after having relied on it.*" (Italics ours)

See, also:

Tacoma v. Tacoma Light & Water Co.,
16 Wash. 286, 47 Pac. 738;

Williamson v. United, etc. of Carpenters,
12 Wn.(2d) 171, 184, 120 P.(2d) 833.

Here, also, other basic essential and required elements of a fraud action are missing. There are no facts alleged sufficient to support a charge that the representations which appellant claims he relied upon were false, or that same were known by the appellee

to be false at the time it is alleged that the representations were made. Nor are there allegations of facts sufficient to support a charge that appellant was ignorant of their falsity. Nor are there any facts alleged to indicate that appellant had a right to rely upon the representations.

To the contrary, from the facts alleged it conclusively appears that there was no fraud. Neither appellee nor appellant in 1910 knew or could have known with any degree of accuracy whether the renewal commissions and Nylic payments which appellant would be entitled to receive under the alleged agreements of August 17, 1910, during the seventeen-year period ending December 31, 1927, would be greater or less than the renewal commissions he might have been entitled to receive under the prior agreement of January 1, 1908. As previously pointed out it affirmatively appears from the allegations that all of the material facts known by appellee were known by appellant. His ability to predict the events of the future and to evaluate the effect of such events in terms of the compensation he would be entitled to receive was the equal of appellee's. There was no concealment or misrepresentation of any material fact of which appellee had or could have had knowledge.

Nor was there any uncertainty or ambiguity about the formulae to be used in the computation of appellant's compensation. The formulae for computing the amount of the renewal commissions which appellant might have been entitled to receive under the contract of January 1, 1908 (Exhibit "A") if it had not been terminated, and the amount of the renewal commis-

sions and "Nylic" payments which appellant would be entitled to receive during the seventeen-year period ending December 31, 1927, under the agency agreement of August 17, 1910 (Exhibit "C") and the so-called "Nylic Contract" (Exhibit "B"), are set forth in the respective agreements in plain and unambiguous terms. Appellant was as fully informed in respect of said formulae or percentages as was appellee. In 1910 there was no misunderstanding about such formulae, and in respect thereof there is no misunderstanding now. Nor is there any issue here in respect thereof. This action is not an action based upon a breach of either of said agreements.

Naturally, in 1910 the factors to which these formulae would apply during the subsequent seventeen-year period were speculative and variable. Before it would be possible to estimate or compute the amount of the payments which appellant would be entitled to receive under any of the agreements, the parties would need to know, among other items, (1) the number of policies which would be issued on applications secured by appellant, (2) the annual premiums provided for in each, (3) the amount of the life insurance represented by each policy, (4) the number of years each policy would be kept in force by annual payments of the premiums by the policy holder, and (5) the number of years the agency agreements or Nylic would remain in force during the seventeen-year period (by express provision in each of the agreements either party had the right to terminate same at will upon thirty days' written notice).

In respect of these variable factors appellant's

information and knowledge were equal to that of appellee. Appellant had all information which appellee had. Appellee's guess or opinion in 1910 about these unknown and variable factors could not possibly be of any greater accuracy or weight than the guess or opinion of appellant.

Consequently, it appears from the allegations in the complaint that appellant in 1910 knew as much about the variable factors to which the prescribed and known formulae were to be applied as did appellee. Moreover, appellant had actual knowledge and information equal to that of appellee in respect of the future possibilities and the compensation which appellant might be entitled to receive in the future under the agency agreement and Nyllic contract, both dated August 17, 1910, as compared with the renewal commissions he might possibly have been entitled to receive if the agreement of January 1, 1908, were to remain effective until January 1, 1928.

It follows, we submit, that it appears from the allegations of the complaint that the following essential elements of a fraud action, among others, are here missing, namely: (1) a representation of an existing fact, (2) its falsity, (3) the speaker's knowledge of its falsity or ignorance of its truth, (4) ignorance of its falsity on the part of appellant, (5) appellant's reliance on the truth of the representation, and (6) appellant's right to rely upon it. Without allegations of facts which if proved would establish each of these essential elements, appellant fails to state a claim upon which relief can be granted.

It seems appropriate to specifically point out that

appellant here may not base an action for fraud upon a charge that he did not read the written contracts which are plain and unambiguous, or did not know the contents or effect thereof, or was misled concerning the provisions set forth therein.

Mason v. Burnett, 126 Wash. 498, 218 Pac. 255;

Johnston v. Spokane & Inland Empire R. Co., 104 Wash. 562, 177 Pac. 810;

Sherman v. Sweeney, 29 Wash. 321;

Hubenthal v. Spokane & Inland R. Co., 43 Wash. 677, 685, 86 Pac. 955.

As stated in the *Hubenthal* case last cited:

“* * * it seems to us that parties must exercise ordinary business sense, and the faculties which are given to them for the purpose of transacting business; and that they cannot call upon the law to stand in loco parentis to them in the ordinary transactions of business, and their ordinary dealings with their fellowmen. * * * If people having eyes refuse to open them and look, and having understanding refuse to exercise it, they must not complain, when they accept and act upon the representations of other people, if their venture does not prove successful. Written contracts would become too unstable if courts were to annul them on representations of this kind.’

“The rule above announced has been reiterated in many subsequent cases. *West Seattle Land & Imp. Co. v. Herren*, 16 Wash. 665, 48 Pac. 341; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180; *Sherman v. Sweeney*, 29 Wash. 321, 69 Pac.

1117; *Hulet v. Achey*, 39 Wash. 91, 80 Pac. 1105; *Lake v. Churchill*, 39 Wash. 318, 81 Pac. 849; *Walsh v. Meyer*, 40 Wash. 650, 82 Pac. 938. True, in nearly all of these cases the false representations related to the quality, quantity, or condition of property embraced in a contract of sale or deed, *but if a party cannot rely upon the representations of others as to such matters when the means of investigation are at hand, should not the rule apply with even greater strictness where an attempt is made to avoid the effect of a written contract which a party has signed, relying solely upon the representations of another as to its contents.*" (Italics ours)

In the Appendix we cite and quote from some of the other authorities which are in point.

Under the foregoing authorities and principles and under the allegations of the complaint, we submit that there was a complete failure to state a claim upon which relief can be granted because basic and essential elements of a fraud action were not alleged and it conclusively appears that there was no fraud.

II.

Apart from all other considerations, there is a failure to state a claim upon which relief can be granted because it conclusively appears from the allegations of the complaint, supplemented by the bill of particulars, that appellant's action is barred by the statute of limitations and by laches on the part of appellant.

The applicable statute of limitations is Remington's Revised Statutes of Washington, Section 159, subdivision 4, which provides that an action for relief upon the ground of fraud shall be commenced within

three years after the cause of action shall have accrued. Appellant concedes that this is the statute here applicable (Appellant's brief, p. 12).

It appears conclusively from the allegations of the complaint, as supplemented by the bill of particulars, that the alleged false and fraudulent representations were oral; that the latest year in which any of said representations was made is 1910; that plaintiff knew from time to time during the seventeen-year period beginning January 1, 1911 and ending December 31, 1927, the amount of the renewal commissions he was paid in accordance with the agency agreement of August 17, 1910 (Exhibit "C"), and also the amount of the Nylic payments he was paid in accordance with Nylic 2 (Exhibit "B"); that appellant received all of said Nylic payments (\$56,498.95) prior to January 1, 1928, and received all of said renewal commissions (\$52,171.54) prior to December 30, 1929; that throughout the period of seventeen years ending December 31, 1927, and since plaintiff at all times knew or could have computed the amounts which he might have received as renewal commissions if the agency agreement of January 1, 1908, were applicable during said period; that appellant's service as an agent of appellee terminated in 1936; and that this action was not commenced until February 14, 1944, more than 33 years after August 17, 1910, more than 16 years after December 31, 1927, and approximately 7½ years after August 22, 1936, the date of the severance of appellant's representation of appellee.

Under these facts, which appear conclusively from the allegations of the complaint as supplemented by the bill of particulars, it is the position of appellee

here, as it was in the District Court, that appellant's action is barred by the statute of limitations because it was not commenced within three years after the cause of action, if any, accrued and within three years after discovery by appellant of the facts constituting the alleged fraud.

This position of appellee is based upon and supported by principles and authorities which are universally recognized and established.

As stated in *Morgan v. Morgan*, 10 Wash. 99, 104, 38 Pac. 1054:

"Under the weight of authority, the statute of limitations is not, now at least, generally regarded as an unconscionable defense. We regard this so well settled that we deem a citation of many authorities unnecessary, but refer to *Wood v. Carpenter*, 101 U.S. 135, where it is said:

"Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. *While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary.* Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and the antidote go together'." (Italics ours)

Discovery of fraud is notice of the fraud. What is notice? The Supreme Court of Washington, in *Deering v. Holcomb*, 26 Wash. 588, 598, 67 Pac. 240, answers the question as follows:

"This we can best answer in the language

adopted by the Supreme Court of the United States.

“Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.’ * * * ‘The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.’ *Wood v. Carpenter*, 101 U. S. 135; *Martin v. Smith*, 1 Dill. 86; *Carr v. Hilton*, 1 Curt. 390; *Morgan v. Morgan*, *supra*; *Wickham v. Sprague*, 18 Wash. 466 (51 Pac. 1055); *Hect v. Slaney*, 72 Cal. 363 (14 Pac. 88); *Wright v. Davis*, 28 Neb. 479 (44 N.W. 490, 26 Am. St. Rep. 347); *Hawley v. Page*, 77 Iowa 239 (42 N.W. 193, 14 Am. St. Rep. 275).

“A party defrauded must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. A clue to the fact, which, if followed up diligently would lead to a discovery, is in law equivalent to discovery, — equivalent to knowledge. *Norris v. Haggin*, 28 Fed. 275.”

See, also:

Irwin v. Holbrook, 32 Wash. 349, 355, 73 Pac. 260.

The presumption is that if the party affected by the alleged fraudulent transaction might with ordinary care and attention have successfully detected it, “he seasonably had actual knowledge of it.” A general allegation of ignorance of the truth at one time and knowledge of it at another is of no effect. The follow-

ing language quoted from *Noyes v. Parsons*, 104 Wash. 594, 599, 177 Pac. 651, declares the rule here applicable and controlling:

“* * * we have many times held that whatever is notice enough to excite attention and put a party upon his guard or call for an inquiry, is notice of everything to which such inquiry might have led. The presumption is that, if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.

“‘A party defrauded must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. A clue to the fact, which, if followed up diligently would lead to a discovery, is in law equivalent to discovery — equivalent to knowledge.’ *Deering v. Holcomb*, 26 Wash. 588, 67 Pac. 240, 561.

* * * * *

“The broad assertion that the statute does not run until the fraud is discovered is not tenable. The statute begins to run when the fraud should have been discovered, and a clue to the fact which, if followed up diligently, would lead to discovery, is in law equivalent to discovery. *Deering v. Holcomb, supra*. A general allegation of ignorance at one time and knowledge at another is of no effect. *Hardt v. Heidweyer*, 152 U.S. 547. In order to excuse a want of knowledge of the fraud, a pleading must set forth what were the impediments to an earlier prosecution of the claim, how the pleader came to be so long ignorant of his rights, the means, if any, used by the opposing party fraudulently to keep him in ignorance, or how and when he first obtained knowl-

edge of the matter alleged in the pleading. *Pearshall v. Smith*, 149 U.S. 231.

“The allegations contained in the complaint negative any excusable want of knowledge of any of the facts necessary to avoid the bar of the statute of limitations on the ground of fraud, and, on the other hand, demonstrate that all the substantive grounds of fraud were known at once, and any other fact necessary to have been known was not actively concealed, was not of a nature to conceal itself, and could have been known by the parties in interest by using ordinary diligence. This is sufficient to start the statute in question running, and justified the sustaining of the demurrer herein.” (Italics ours)

In sustaining a demurrer to a complaint charging a lawyer with fraud in respect of his management of a client's estate, the Supreme Court of the State of Washington, in *Corliss v. Hartge*, 180 Wash. 685, 689, 42 P.(2d) 44, stated and applied the rule which is here controlling, namely:

“There are no facts alleged in the complaint which would call for an accounting on the part of Mrs. Hartge or Mr. Cadwallader. So far as these two respondents are concerned, we shall assume that the complaint seeks to state a cause against them for false and fraudulent representations, in reliance on which the appellant failed to present a claim. False representations, from the facts stated, upon which reliance is made, were uttered in the year 1927, and this action was not begun until May 14, 1934, a period of seven years having elapsed.

“Subdivision 4, of Rem. Rev. Stat., Sec. 159 (P.C. Sec. 8166), provides that, in actions for relief upon the ground of fraud, the cause of

action will not be deemed to have accrued until discovery by the aggrieved party of the facts constituting the fraud. Such actions must be begun within three years thereafter. The statute of limitations begins to run, not only from the discovery of the fraud, but also from the time when the fraud should have been discovered. Notice sufficient to excite attention and put a person on guard or to call for an inquiry is notice of everything to which such inquiry might lead.

“In *Tjosevig v. Butler*, ante, p. 151, 38 P. (2d) 1022, it is said:

“The statute of limitations begins to run, not only upon discovery of fraud, but also from the time when the fraud should have been discovered; and a clue to the facts, which, if diligently pursued, would lead to a discovery, is in law equivalent to discovery itself. Notice sufficient to excite attention and put a person on guard or to call for an inquiry is notice of everything to which such inquiry might have led’.” (Citing authorities)

Again, in *Teeter v. Brown*, 130 Wash. 506, 509, 228 Pac. 291, the court announced and followed the doctrines here relied upon by the appellee, using the following language:

“* * * For fifteen or eighteen years the appellant sat idly by. Meanwhile some of the persons acquainted with the facts have died, and the great lapse of time has dimmed the memory of others. After fifteen years of inaction, he calls upon us. Such a voice does not stir the conscience of a court of chancery. Ordinarily, equity puts out its assisting arm only to those who have shown a disposition to help themselves.

The correct theory with reference to matters of this character was forcefully expressed by one of our deceased associates, in the case of *Ferrell v. Lord*, 43 Wash. 667, 86 Pac. 1060, as follows:

“Where a case is purely of equitable cognizance, in the application of the doctrine of laches courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, ancient demands, and refuse to interfere where there has been gross laches in prosecuting the claim or long acquiescence in the assertion of adverse rights. In such cases the statute of limitations does not necessarily govern the court in the application of the doctrine of laches. * * * Regard must be had to all of the facts and surrounding circumstances, and if, when carefully considered, they do not appeal to the conscience of the chancellor, on behalf of a claimant, the defense of laches should be allowed.’

* * * * *

“A defrauded party must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. It could not have been difficult for the appellant to have ascertained that his property had been acquired by the respondent as his own, and so claimed and operated. Ordinary diligence on his part would have discovered this fact. With the strongest motives for action, he was supine. If there was fraud, he did nothing to unearth it.”

In the recent case of *Henriod v. Henriod*, 198 Wash. 519, 525, 90 P.(2d) 222, the Washington Supreme Court clearly states and follows the principles here relied upon by the appellee, as is shown by the following quotation from the opinion:

“Appellant also contends that the trial court

erred in finding that whatever cause of action appellant had, if any, was barred by the statute of limitations, which began to run at a time when appellant had notice that Mr. Henriod had other property not disclosed by the property settlement agreement.

"The statute of limitations, Rem. Rev. Stat. §159 [P.C. §8166] subd. 4, reads:

"Within three years: * * *

"4. An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud; * * *

"We have consistently held that actions for relief on the ground of fraud premised upon Rem. Rev. Stat., §159, subd. 4, embrace only

"* * * suits by parties to contracts who are asking to be relieved from contracts that they were fraudulently induced to make, as where a deed has been fraudulently obtained, and suits of that character where fraud is the substantive cause of the action.' *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054.

* * * * *

"The case at bar is an action on the ground of fraud within Rem. Rev. Stat., §159, subd. 4, since the alleged fraud attended the execution of the contract and inhered in the contract itself. *Gustafson v. Cullen*, 155 Wash. 107, 283 Pac. 1087. In an action for relief on the ground of fraud, it is incumbent upon the aggrieved party to establish his inability to discern the perpetration of the fraud notwithstanding the exercise of reasonable diligence."

See also:

Matapan National Bank v. Seattle, 115 Wash. 596, 197 Pac. 789;

Hoy v. Burk, 92 Wash. 536, 159 Pac. 701;

Hawkins v. Button, 147 Wash. 246, 265 Pac. 479;

Reeves v. John Davis & Co., 164 Wash. 287, 2 P. (2d) 732.

The issue here is properly raised by a motion to dismiss. It is now definitely established that in any case where the legal effect of the bar of the statute of limitations conclusively appears, as it does here, from the allegations set forth in the complaint, as supplemented by the bill of particulars, the issue is properly raised by a motion to dismiss. Moreover, it is also definitely established that even though the action be treated as one in equity (which obviously the action here is not), the same result would follow in this particular case because of laches on the part of appellant.

On this point, as was hereinabove suggested, Rule 9(f) is considered by the courts to be of significance. It provides:

“For the purpose of treating the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.”

The authorities sustaining this position are the following:

Barnhart v. Western Maryland Ry. Co., 41 F. Supp. 898, 904 (Dist. Court, D. Maryland—Nov. 19, 1941);

Hartford-Empire Co. v. Glenshaw Glass Co.,
47 F. Supp. 711, 714 (Dist. Court, W. D.
Penn.—July 16, 1942);

Wilson v. Shores-Mueller Co., 40 F. Supp.
729, 731 (Dist. Court, N. D. Iowa—Sept.
13, 1941);

Pearson v. O'Connor, 2 F.R.D. 521 (Dist.
Court of United States—Dist. of Colum-
bia—March 19, 1942);

Abram v. San Juaquin Cotton Oil Co., 46 F.
Supp. 969, 974 (Dist. Court, S. D. Cali-
fornia, Central Division—June 3, 1942);

Cramer v. Aluminum Cooking Utensil Co.,
1 F.R.D. 741 (Dist. Court, W. D. Penn.
—May 24, 1941).

Under the foregoing authorities it is submitted that it appears conclusively that appellant's action is barred by the statute of limitations because it was not commenced within three years after the cause of action, if any, accrued, and within three years after discovery by appellant of the facts constituting the alleged fraud.

There was no fiduciary relationship between appellant and appellee.

As before pointed out, it is alleged (Par. X, R. 26) that "the plaintiff reposed great confidence in the defendant and its methods of business and that a fiduciary relationship existed between the parties and that as a result of plaintiff's trust as to the manner of the operation of the defendant plaintiff did not discover that said representations as to the amount of his compensation were falsely and fraudulently made to

him and that plaintiff did not discover that such representations were false and fraudulent until within a period of at least a year from the date hereof."

It seems to be the position of appellant that these allegations are sufficient to excuse appellant's long delay in the commencement of this action, a delay of sixteen years or more after he knew, or by the exercise of ordinary diligence could have known, of the alleged fraud.

It is the position of appellee here, as it was in the District Court, that said allegations are not sufficient for such purpose and that it affirmatively appears that there was no fiduciary relationship between plaintiff and appellee.

As has been pointed out, under the alleged facts and the authorities to which attention has been directed a general allegation of ignorance at one time and knowledge at another is of no effect. In order to excuse want of knowledge of the alleged fraud the pleading must set forth "what were the impediments to an earlier prosecution of the claim, how the pleader came to be so long ignorant of his rights, the means, if any, used by the opposing party fraudulently to keep him in ignorance, or how and when he first obtained knowledge of the matter alleged in the pleading." The defrauded party must be diligent in making inquiry. It is incumbent upon him to allege and establish his inability to discern the perpetration of the fraud notwithstanding the exercise of reasonable diligence.

Here it seems obvious that the motion to dismiss

does not admit appellant's conclusion "that a fiduciary relationship existed between the parties."

In any event, the said allegations, relied upon by appellant, are not sufficient. There must, it is believed, be allegations of facts which if proved would establish a relationship between appellant and appellee which would constitute a fiduciary relationship within the definition thereof recognized by the courts.

To the contrary here it appears conclusively from the allegations of the complaint, as supplemented by the bill of particulars, that no fiduciary relationship which could be recognized as such by any court existed between appellant and appellee.

Appellant was an insurance agent, employed only as a soliciting agent. Obviously the relationship between appellant and appellee was nothing more than the normal and traditional relationship which exists between any principal and a soliciting agent in the life insurance business. There is no allegation that appellee ever acted or purported to act as an agent of appellant, or purported to represent or to act for or in behalf of appellant in any capacity. If any such charge were made, it could not be accepted as true. Appellant and appellee were dealing at arm's length and there is no allegation of fact to the contrary. Nor is there any charge that appellant was under a disability which imposed some unusual duty upon appellee to protect appellant. Nor is there any allegation of fact which could possibly indicate the existence of a relationship between appellant and appellee which impelled or induced appellant to relax the care and vigilance which he otherwise should and ordinarily

would exercise. The relationship was only a normal and traditional business relationship.

On principle, it is submitted, this position of appellee is sound. It is also sustained by the authorities.

In *Collins v. Nelson*, 193 Wash. 334, 345, 75 P. (2d) 570, the action was brought to recover for the loss of money paid by plaintiff on two promissory notes which were given in the purchase of certain mining stock which was placed in escrow with the defendant. The facts, as in most such circumstances, are extremely complicated. For present purposes it is enough to say that the plaintiff had had some further business transactions with the defendant; that there was testimony of a conversation between the parties at which defendant guaranteed to see that the stock was put up in escrow, and that in paying the notes plaintiff relied upon defendant's promise, and believed that the stock had been placed in escrow with the defendant as escrowee; that a copy of the escrow agreement, naming defendant as escrowee, was forwarded to the defendant; and that at the time of the payment of the notes defendant knew that the stock had not been placed in escrow as agreed.

Plaintiff contended that the action was for fraud and deceit. The theory was that a confidential relation existed between plaintiff and defendant, and that it was the duty of defendant, at the time plaintiff paid the notes, to inform plaintiff that the stock was not in defendant's possession, nor ready for delivery. In holding that no confidential relation existed, the court said:

“The court did not find, nor are we able to dis-

cover from the evidence, that there was any confidential relation existing between Nelson and Collins. It is true that there had been some social contact and friendly relations, as well as one prior business transaction between them, but there was no relation which, in law, could be said to be confidential. The social relations were casual, and the prior business deal involving the sale by the one and the purchase by the other of certain stock had been conducted at arm's length.

“To establish a fiduciary relationship upon the violation of which fraud is sought to be based, there must be something more than mere friendly relations or confidence in another's honesty and integrity. *There must be something in the particular circumstances which approximate a business agency, a professional relationship, or a family tie, something which itself impels or induces the trusting party to relax the care and vigilance which he otherwise should, and ordinarily would, exercise.*” (Underscoring supplied)

In *Cranwell v. Oglesby*, 12 N.E.(2d) 81, the Supreme Judicial Court of Massachusetts, quoting from one of its earlier decisions, states the fundamental requirement to be as follows:

“‘Mere respect for the judgment of another or trust in his character is not enough to constitute such a relation. There must be such circumstances as indicate a just foundation for a belief that in giving advice or presenting arguments one is acting not in his own behalf, but in the interests of the other party. If the relation is a business one, the existence of the mutual respect and confidence does not make it fiduciary.’”

In *Van Dale v. Prudential Ins. Co. of America*, 274 N. W. 153 (Wis. 1937), the action was initiated

by the plaintiff to recover disability benefits under four life insurance policies which had been issued to him by the defendant, notwithstanding the fact that plaintiff had theretofore, in consideration of the payment to him of the sum of \$5,110.20 (disability payments for eighteen months), surrendered two of the policies for cancellation, and the other two policies for reissue with the disability clauses eliminated therefrom. The plaintiff alleged that the surrender of the policies was induced by fraudulent representations upon which he relied.

It so happened that plaintiff had also been a soliciting agent for the defendant company for some years, as a result of which it was contended that a confidential or fiduciary relationship existed between the plaintiff and the defendant. On this point the court said:

“The trial court was of the opinion that a confidential or fiduciary relationship existed between the plaintiff and the defendant. We see no warrant for such a conclusion. True, the plaintiff had been in the employ of the defendant for a number of years, had been a valued employee, had enjoyed and received the approbation of his employer, and rightly had faith and confidence in the defendant company, but those facts did not create a fiduciary relationship, * * *.”

Under the allegations relied upon by appellant and the foregoing authorities it is submitted that it conclusively appears that there was no fiduciary relationship between appellant and appellee.

Moreover, if it be assumed that a fiduciary relationship did exist at any time between appellant and

appellee, there is no allegation in the complaint of any fact from which it may reasonably be inferred that appellee was guilty of any act, either of commission or omission, which would be a violation of any duty owed by defendant to plaintiff, whatever the relationship may be considered to have been. To the contrary, it affirmatively appears that there was no fraud.

If there had been any fiduciary relationship between appellant and appellee, it terminated not later than August 22, 1936.

In addition, if it be assumed that at any time a fiduciary or any relationship other than a normal and traditional business relationship of principal and agent existed between appellant and appellee, it is obvious that in any event it could not toll the running of the statute of limitations after the date the relationship ceased to exist.

Here the alleged representations were made, according to appellant, in 1910. The period in respect of which the alleged representations would apply was the seventeen-year period ending December 31, 1927. Appellant did not serve as agent of appellee subsequent to August 22, 1936. It follows that all relationship between appellant and appellee terminated not later than August 22, 1936.

In the language of the court in *Davis v. Rogers*, 128 Wash. 231, 238, 222 Pac. 499:

“It is to be remembered also that the fiduciary relation, if one existed, terminated with the transaction in 1911. * * * The case of *Irwin v. Holbrook*, *supra*, in which the statute of limitations was held to apply in an action between principal

and agent, is strikingly similar to its facts to the facts of this case, and it was there held that the defrauded party was guilty of such negligence in not discovering the fraud for more than six years after the repudiation of the trust relation that he was held to have discovered it three years before the action was begun, and therefore the statute of limitations barred his recovery. We think, under the facts of this case, the same rule that applied in the *Irwin* case should be applied here, and the evidence strongly preponderating against the findings of the trial court, the judgment is reversed and the action dismissed."

It follows that from the allegations of the complaint, as supplemented by the bill of particulars, it conclusively appears that there was no fiduciary relationship between appellant and appellee and that if at any time there had been, it terminated not later than August 22, 1936.

Moreover, as heretofore pointed out, it also conclusively appears that the relationship between appellant and appellee was nothing more than the normal traditional contractual relationship which exists in the insurance business between any principal and the soliciting agent. Appellant was the agent of appellee. Appellee was not in any respect the agent of appellant.

III.

The points and authorities relied upon by appellant are not here applicable.

Appellant relies upon *Cole v. Utley*, 188 Wash. 667, 63 P. (2d) 473. It is obvious, we believe, that the case is not of aid to appellant.

There plaintiff was suing her brother to recover money alleged to have been fraudulently withheld by the brother who had acted as *her agent* in the sale (in 1907) of a timber claim. It appeared, "quite clearly, that, at the time she acquired the timber claim and long after the disposal of it, she placed full trust and confidence in her brother, relied upon him for advice in her business matters, and in the matter of the sale of the claim she constituted him her agent and accepted his statements as to facts without question. In all things relating thereto, she followed his directions fully. At his request, she executed a deed in blank and authorized him to fill in the name of the purchaser. The consideration named in the deed which she executed was one dollar" (188 Wash. pp. 669, 670).

Consequently, it there appears conclusively that a fiduciary relationship existed between the sister and her brother. The brother was the agent of the sister. Here there was no fiduciary relationship between appellant Moser and appellee, and appellee here was not in any capacity the agent or representative of appellant Moser.

In the *Utley* case the brother sold his sister's claim and represented to her that the amount he received for her claim was \$5,000. He had in fact received more.

Consequently, his representation that he had received for her only \$5,000 was a false representation of an existing fact. Here, there is no charge of a false representation of an existing fact and it conclusively appears that there was no misrepresentation of an existing fact.

In the *Utley* case there was "no hint of anything which would have put her (the sister) on notice," and the court held, properly we believe, that in the absence of anything to cause the question to arise in her mind "we cannot say that she was at fault in continuing to trust her brother as she did" (188 Wash. 670).

Here it conclusively appears that appellant knew in 1928 the amount which he had received from appellee as renewal commissions and Nylic payments during the 17-year period ending December 31, 1927. He knew, also, or should have known and could have then ascertained by computations of his own, the amount of the renewal commissions he would have received under the prior agency agreement if it had remained in force throughout said 17-year period. Consequently, in 1928 appellant Moser had actual knowledge or means of knowledge of all the material facts now relied upon by him as a basis for recovery in this action which was commenced in the year 1944.

In the *Utley* case the fiduciary relationship between plaintiff and her brother did not cease until the death of the brother, which occurred after the commencement of the litigation. Here, apart from the fact that there never was any fiduciary relationship between appellant Moser and the appellee, all relationship between them was severed in 1936.

Appellant cites *Larson v. McMillan*, 99 Wash. 626, 170 Pac. 324. There the fiduciary relationship between the parties was considered by the court to be that of husband and wife. In the language of the court: "Whatever their relations to others may have been, the principals in this unfortunate affair were not dealing at arm's length. They were conjugate; and their relations *inter sese* were as fiduciary as if the marriage had been a valid one. The trust of a wife is not to be swept away as a thistledown by a breath of suspicion. It is the policy of the law, for the good of society demands it, that trust and confidence between a husband and wife shall be sustained to the very limit" (99 Wash. 631, 632).

Obviously, in the instant case there is no analogous relationship between appellant Moser and appellee.

Appellant's charge (paragraph X) to the effect that the appellee kept all the books and accounts and made all payments of compensation that were due is here of no significance. There is no issue in respect of the accuracy of such accounting or in respect of payment of the full amount of the compensation that was due appellant under the agency agreement of August 17, 1910 (appellant's Exhibit "C") and Nyllic Appellant accepts said accounting as correct. As to the hypothetical accounting in respect of the amount of compensation for renewals which appellant might have been entitled to receive if the prior agency agreement of January 1, 1908, had not been terminated, there is no charge that appellee at any time made and submitted to appellant a false or erroneous accounting or any accounting of such a speculative and hypo-

thetical character. Moreover, it appears conclusively, as heretofore pointed out, that at all times both prior and subsequent to January 1, 1928, appellant had at his command and in his possession all the available information necessary or required to enable appellant to ascertain for himself the aggregate amount of the hypothetical compensation which he here claims is the amount he would have received as renewal commissions if the prior agency agreement had not been terminated.

Appellant's suggestion (Brief 14) that whatever relationship existed between appellant and appellee continued subsequent to August, 1936, is not only contrary to the facts but is here of no significance. It is contrary to the facts because appellant's status as a Senior Nylic became fixed and final as of December 31, 1927. Appellant, having become a Senior Nylic, there was nothing further required of either appellant or appellee to continue that status and nothing that either of them could do to change it. There was and is nothing active about such a status. Since December 31, 1927, it has not been and it is not now an active relationship. The only incident arising from the fact that plaintiff became a Senior Nylic is that he receives monthly the Senior Nylic income provided in Nylic 2 (Exhibit "B," R. 62).

Appellant's Senior Nylic status, whatever may be the relationship by reason thereof between appellant and appellee, is of no significance because the issues here are in respect of alleged transactions which occurred prior to January 1, 1928, and prior to the date that plaintiff attained the status of a Senior Nylic.

The Senior Nyllic relationship and Senior Nyllic income of appellant are not here involved, either directly or indirectly.

It is submitted that under the allegations of the complaint, as supplemented by the bill of particulars and the authorities and principles here cited and discussed, and for the reasons herein set forth, appellee's motion to dismiss appellant's action was properly granted and the judgment of dismissal of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

As stated in *Tacoma v. Tacoma Light & Water Co.*,
16 Wash. 288, 296:

“A representation, to be actionable, must be made with the intention that it should be acted upon by the party to whom it is made, and it must be made under such circumstances as would justify a reasonably prudent man in relying upon it, and, generally speaking, where the means of knowledge is at hand and accessible, if the purchaser does not avail himself of these means, he cannot be heard to complain in a court of law that he was deceived by the seller’s misrepresentations, or, as was said in *Washington Central Imp. Co. v. Newlands*, 11 Wash. 214 (39 Pac. 367):

‘Parties must exercise ordinary business sense, and the faculties which are given to them for the purpose of transacting business; and that they cannot call upon the law to stand in *loco parentis* to them in the ordinary transactions of business and their ordinary dealings with their fellow men. * * * If people having eyes refuse to open them and look, and having understanding refuse to exercise it, they must not complain, when they accept and act upon the representations of other people, if their venture does not prove successful. Written contracts would become too unstable if courts were to annul them on representations of this kind.’”

In *Andrews v. Standard Lumber Company*, 2 Wn. (2d) 294, 300, 97 P.(2d) 1062, the following statement of the court is in point:

“Careful examination of the record fails to disclose that respondents introduced any direct evidence tending to prove that appellant’s agent

had knowledge of the falsity, or was ignorant of the truth, of the representations attributed to him in regard to the Pabco plan. There was no evidence which even tended to show that the plan had not proven effective when followed by other builders.

“The record discloses that respondents relied upon the representations relating to appellant’s oral guaranty to the effect that there would be no outstanding liens or encumbrances upon completion of the house. * * *

“In their final analysis, the statements attributed to appellant’s agent amounted simply to an agreement that the Pabco plan would result in a completed building guaranteed by appellant not to exceed the cost of \$3,700. *Appellant cannot be charged with fraud simply because that amount was exceeded.*” (Italics ours)

One rule here applicable is stated in *Penney v. Pederson*, 146 Wash. 31, 35, 261 Pac. 636:

“The second and principal question is, whether there was false representation as to the revenue which the various apartments were producing at the time the lease was entered into. Before signing the lease, the appellant was presented by the respondent Hans Pederson with a statement or list of the apartments, with a sum set opposite each which would indicate the rental value. The complaint, in this respect, is drawn upon the theory that Pederson, at the time, represented that the statement showed the rent which was then being received per month for the various apartments. The respondents contend that the representation was as to what the apartments would bring after the appellant had entered into possession and had furnished the same or some

of them. If the representation was to the effect that the apartments were then bringing the rental indicated by the statement and if this were untrue, it would furnish a basis for liability for fraud. *Hahn v. Brickell*, 135 Wash. 189, 237 Pac. 305; *Bliss v. Clebanck*, 136 Wash. 32, 238 Pac. 979. On the other hand, if the representation was what the apartments would bring after the appellant took possession, this would be only a matter of opinion and, if untrue, would not be actionable. *Stewart v. Larkin*, 74 Wash. 681, 134 Pac. 186, L.R.A. 1916B 1069; *Davis v. Masonic Protective Ass'n.*, 94 Wash. 406, 162 Pac. 516; *Community State Bank v. Day*, 126 Wash. 687, 219 Pac. 43.

* * * * *

“The evidence being to the effect that the false representation was as to what the apartments would bring in the future, and not as to a then present fact, the trial court did not err in taking the case from the jury.”

Again, in *Kirkland v. Dressel*, 104 Wash. 668, 673, 177 Pac. 643, one of the principles relied upon by defendant is stated and followed:

“The original representations as to the probability of bankruptcy proceedings if appellants' claims were insisted upon, and the suggestions or statements that there would be enough left to pay them after all other creditors were paid in full, were clearly expressions of opinion only, and that, too, upon subjects of which appellants had equal knowledge, and upon which their own judgment should have been as good as that of respondents. Clearly these statements or representations do not constitute actionable fraud.”

In *Rankin v. Burnham*, 150 Wash. 615; 618, 274 Pac. 98, heretofore cited, the court states:

“* * * a representation that something will be done in the future, or a promise to do it, from its nature cannot be true or false at the time when it is made. The failure to make it good is merely a breach of contract, which must be enforced by an action on the contract, if at all. And as in the case of promises, it is generally held that mere assertions of intention, or declarations of future purpose, do not amount to fraud.”

In *Pigott v. Graham*, 48 Wash. 348, 351, 93 Pac. 435, in sustaining a demurrer to a complaint in an action based on fraud, the court stated:

“Cases of this character are frequently hard to determine, for there are so many independent circumstances surrounding each case that it is difficult sometimes to discern the dividing line between that character of fraud and misrepresentation which justifies the purchaser in relying upon such representations, and those representations which are made where the parties are standing on a plane, where the facts which are the subject matter of the representations are ascertainable, and where it is the duty of the purchaser to put on foot such examination as is necessary to determine the facts concerning which the negotiations are made. But notwithstanding these different circumstances, there are certain basic principles upon which the cases must be adjudicated, and the difficulty is not so much to determine the law as to determine whether the particular circumstances bring the cases within the established rules of law. This court, in the case above referred to, said:

“We think the proper and sensible rule was

laid down by the United States supreme court in *Slaughter's Adm'r. v. Gerson*, 13 Wall. 379, where it was held that *the misrepresentation which would vitiate a contract of sale and prevent a court of equity from aiding its enforcement, must relate to a material matter constituting an inducement to the contract, and respecting which the complaining party did not possess at hand the means of knowledge.*'

"That court, after announcing the rule as noted, further said, through Justice Field, who delivered the opinion of the court:

"A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to consideration when he complains that he has suffered from his own voluntary blindness and been misled by overconfidence in the statements of another.' *Slaughter's Adm'r. v. Gerson*, 13 Wall. 379, 20 L. ed. 627." (Italics ours)

In *Biel v. Tolsma*, 94 Wash. 104, 106, 161 Pac. 1047, the court states and follows one of the principles here applicable as follows:

"We have never held, and indeed no reputable court has held, that in dealing for property, real or personal, when the property was at hand and

the means of ascertaining its condition, its correspondence with the representations made concerning it by the seller, and its value, reasonably ascertainable, that a buyer could shut his eyes thereto, and blindly and recklessly rely upon any and all opinions or representations made concerning it by the seller. To establish such a rule would be to place a premium upon carelessness and indifference."

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

F. C. MOSER, *Appellant,*

vs.

NEW YORK LIFE INSURANCE
COMPANY, *a corporation,*
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S OPENING BRIEF

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FILED

FEB 19 1934



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F. C. MOSER,

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No. 10925

UPON APPEAL FROM THE DISTRICT COURT OF THE
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OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal from an order and judgment of dismissal of the District Court of the United States for the Western District of Washington, Northern Division, in a law action No. 901 entitled "F. C. Moser, plaintiff vs. New York Life Insurance Company, a corporation, defendant" which order and judgment of dismissal dismissed plaintiff's action with prejudice to any subsequent suit or action upon said claim, with costs to the appellee. (Tr. 8)

The appellant, F. C. Moser, commenced this action

in the Superior Court of the State of Washington for King County against the appellee, New York Life Insurance Company, a corporation. Within the time required by law appellee filed a petition for removal of the action to the United States District Court for the Western District of Washington, Northern Division. (Tr. 2) Appellee further filed its Removal Bond in the said Superior Court. (Tr. 8) By order dated March 6, 1944, the judge of said Superior Court entered an order accepting the petition and bond and directing the removal of the cause to the United States District Court for the Western District of Washington, Northern Division, the basis of said removal being diversity of citizenship and the amount involved exceeding \$3,000.00. (Tr. 10)

The appellee thereafter filed its appearance. (Tr. 13), and its bond of non-resident defendant on removal (Tr. 14) with the clerk of the United States District Court.

Appellee then served and filed motion to dismiss appellant's complaint on the ground that (1) plaintiff failed to allege facts sufficient to state such a claim, and (2) it appears affirmatively from the allegations thereof that the action alleged, if any is barred by the statute of limitations of the State of Washington, and by laches on part of plaintiff. (Tr. 16), together with a motion for more definite statements or for a bill of

particulars. (Tr. 17) On July 3, 1944, the court entered an order granting appellee's motion for a bill of particulars. (Tr. 29) Appellant thereafter served and filed a bill of particulars. (Tr. 33).

After a hearing was had the judge of the District Court entered an order dismissing appellant's action on September 11, 1944. (Tr. 80-81).

On October 10, 1944, appellant filed with the clerk of the District Court notice of appeal to the Circuit Court of Appeals and cost bond on appeal pursuant to the provisions of Rule 73 (C) of Federal Rules of Civil Procedure (Tr. 8-82). On October 24, 1944, appellant filed a Designation and Content of record on Appeal with the clerk of the district court (Tr. 83).

This court has jurisdiction of this case by reason of Section 28 of the Judicial Code and Section 71, Title 28, U. S. C. A.

STATEMENT OF THE CASE

Appellant, F. C. Moser, commenced this action to recover damages from the appellee, New York Life Insurance Company, a corporation, arising from the alleged fraudulent and false representations claimed to have been made by appellee to appellant. The trial court sustained appellee's motion to dismiss on the ground that appellant's action was barred by the Statute of Limitations and laches. From the order and judgment of dismissal with prejudice, this appeal is taken.

Appellant's complaint herein was augmented by a bill of particulars. The salient allegations of the complaint are Tr. 23-27) :

II

That the defendant is a foreign corporation and at all times herein mentioned has been and now is doing business in the State of Washington under and pursuant to the applicable laws of the State of Washington permitting foreign corporations to do business in this state; that said defendant at all of said times has and does now maintain an office in Seattle, King County, Washington, for the transaction of company business.

III

That at all times from October 7, 1907, to and including August 22, 1936, the plaintiff was a special agent of the defendant corporation for the purpose of canvassing for applications for life insurance and annuities and performing such other duties as might be required of him by the terms of his contract of employment with the defendant corporation consisting of agency agreements and Nylie. (26)

IV

That on or about January 1, 1908, plaintiff entered into a contract with the defendant wherein the plaintiff was to employ his full time as a soliciting life insurance agent for the defendant, which agreement provided for compensation to the plaintiff of nine (9) renewals of five (5) per cent each, or a total renewal commission of forty-five (45%) per cent.

V

That some time in the year 1910 the defendant established for its life insurance soliciting agents a "dual agency system" consisting of "Nylic" and a single agency agreement; that "Nylic" is a system which embraces two periods, the first period of twenty (20) years designated by the defendant as the "Qualifying Nylic Period" and the lifetime period thereafter designated by the defendant as the "Senior Nylic Period."

VI

That during the year 1910 while the plaintiff was working for the defendant under said agreement dated January 1, 1908, the defendant in order to have the plaintiff surrender his said agreement dated January 1, 1908, and to permit the defendant to substitute therefor an agreement under the defendant's said Dual Agency System represented to the plaintiff that the plaintiff's compensation under said Dual Agency System during plaintiff's qualifying Nylic period which the parties agreed to be for seventeen (17) years expiring January 1, 1928, would be the equal of the 45% in renewals provided for in the said agreement dated January 1, 1908.

VII

That plaintiff relying upon said representations (27) entered into a contract with defendant

under the said Dual Agency and "Nylic" system and surrendered the contract dated January 1, 1908, and in lieu thereof defendant gave plaintiff an agency agreement dated August 17, 1910, and a "Nylic" contract, both to become simultaneously effective on January 1, 1911.

VIII

That at all times during said plaintiff's said qualifying "Nylic" period of 17 years between January 1, 1911, and January 1, 1928, the plaintiff performed services under said contract relying upon the said defendant's representations as to the amount of compensation to be paid plaintiff by the defendant thereunder.

IX

That said representations were false and fraudulent in that the plaintiff actually received during said period from the defendant under said Dual Agency System, \$52,171.45 in renewal commissions and \$56,498.95 in "Nylic" payments, or a total Dual Agency payment of \$108,709.82, whereas during this same period plaintiff would have been entitled to receive the sum of \$156,514.35 in renewal commissions under the single agency agreement dated January 1, 1908, and that by reason of the premises defendant has wrongfully defrauded plaintiff out of the sum of \$47,804.53, which sum is now due and owing.

X

That the defendant at all times made all the calculations, handled all of the funds and made all the payments on compensation that was due based on its own calculations; that the plaintiff reposed great confidence in the defendant and its methods of business and that a fiduciary relationship existed between the parties and that as a result of plaintiff's trust as to the manner of the operations of the defen-(28)dant plaintiff did not

discover that said representations as to the amount of his compensation were falsely and fraudulently made to him and that the plaintiff did not discover that such representations were false and fraudulent until within a period of at least a year from the date hereof.

The Bill of Particulars disclosed the following additional facts which appellant believes to be pertinent to a consideration of this appeal.

Concerning the nature of the representations, the Bill of Particulars alleged that (Tr. 35) :

(f). The specific promise and representations were that if plaintiff would surrender to defendant plaintiff's agency agreement dated January 1, 1908, plaintiff's Exhibit "A" and permit defendant to substitute for same defendant's Dual Agency System comprising an agency agreement, plaintiff's Exhibit "C" and "Nylic", plaintiff's Exhibit "B", that the compensation of plaintiff under said Dual Agency System during the qualifying Nylic period of said Nylic System which it was agreed would be for 17 years from January 1, 1911, to January 1, 1928, would equal or exceed compensation which plaintiff would make during said 17 years under plaintiff's agency agreement, Exhibit "A". Plaintiff's Agency Agreement, exhibit "A" provided for nine renewals of 5% each and one extra fifth year renewal of 5%.

and further that the Nylic payments in the sum of \$56,498.95 were received by appellant prior to January 1, 1928, and that of the item of \$52,171.54, the sum of \$49,298.66 was received prior to January 1,

1928, and the balance of \$2,892.88 from January 1, 1928, until December 29, 1929 (Tr. 36).

The original agreement dated January 1, 1908, between appellant and appellee (Tr. 37-46) provided in part that (Tr. 41) :

“13th. It is agreed that the first party’s ledger account with said second party shall at all times be competent and conclusive evidence of the state of the account between the parties hereto, and shall constitute a mutual estoppel as between them. In consideration of the last above agreement in this paragraph contained, the first party agrees to furnish to the second party a copy of his said ledger account, not oftener, however, than once a month upon receipt of written request therefor, due allowance to be made, however, for clerical delays in furnishing the same, and if one copy of his ledger account has been furnished him, any subsequent copy may consist only of the additional ledger entries made since the date of the last copy of additional ledger entries furnished him.”

This same clause is in the agreement dated August 17, 1910, (Tr. 69) which was substituted for the agreement dated January 1, 1908, in paragraph 13 thereof as follows (Tr. 73) :

“13th. It is agreed that the first party’s ledger account with said second party shall at all times be competent and conclusive evidence of the state of the account between the parties hereto, and shall constitute a mutual estoppel as between them.”

This agreement also provided (Tr. 75) :

“19th. It is expressly understood and agreed

that this agreement shall be considered strictly confidential, and that under no circumstances shall said second party mention or exhibit the terms thereof to any person or persons.”

In connection with and as a part of the “Dual Agency” system of which the above contract was one part, and “Nylic” (Tr. 47) the other part. Nylic consisted of a twenty year qualifying period and after the successful completion of this period, the agent became a Senior Nylic. To become a member of Nylic, the agent must agree as follows (Tr. 53) :

“Any agent of the New York Life Insurance Company, in good and regular standing, shall, upon making written application on the Company’s authorized form, and upon agreeing, so long as he remains a member of Nylic, to devote all his time, talents and energies to the company’s service in soliciting personally for business, and also upon receiving a certificate of membership executed by the Company, becomes a Freshman Nylic as of January 1, preceding the date of his contract, or on any January 1 thereafter, as he may elect, if he complies with all of the conditions laid down herein.”

Appellant fulfilled the requirements of Nylic and became a Senior Nylic.

To the complaint as supplemented by the foregoing Bill of Particulars, appellee filed a motion to dismiss based on the grounds that (1) plaintiff fails to allege facts sufficient to state such a claim, and (2) it appears affirmatively from the allegations thereof that

the action alleged, if any is barred by the statute of limitations of the State of Washington, and by laches on part of plaintiff.

This Motion was sustained by the Trial Court and an order entered dismissing the action with prejudice (Tr. 80).

SPECIFICATIONS OF ERROR

I. The Court erred in sustaining appellee's Motion to Dismiss Appellant's Complaint.

II. The Court erred in entering an order dismissing Appellant's action with prejudice.

III. The Court erred in holding Appellant's action barred by the Statute of Limitations.

SUMMARY

Since this matter arises from the action of the trial court in sustaining appellee's motion to dismiss to appellant's complaint, the only factual question presented on this appeal is whether the complaint is barred by the Statute of Limitations or by laches, the complaint alleging that appellant, now a Senior Nylic and a life insurance agent until 1936 of appellee life insurance company seeks recovery of damages sustained by him when appellee falsely and fraudulently induced appellant to surrender an existing agency contract for another contract providing for a different and complicated method of compensation to appellant by falsely representing that the amount to be received under the new and complicated method would exceed the former compensation; it further appearing that appellee kept all the books and records and that a fiduciary relationship existed between the parties and that appellant had the greatest trust and confidence

in appellee and only discovered the fraud within a year before the action was commenced; it further appeared that the last payment was received by appellant in 1930.

The motion to dismiss, being in effect a demurrer, admits the truth of the facts alleged.

Soule v. Seattle, 6 Wash. 315, 33 Pac. 1080.

McMillan v. Sims, 129 Wash. 516, 225 Pac. 240.

The relevant statute of limitations of the State of Washington governing this action is Remington's Revised Statutes, Sec. 159, subdivision 4, which provides as follows:

Within three years:

* * * * *

(4) "An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud."

This motion to dismiss admits that a fiduciary and confidential relation existed between appellant and appellee. As long as such relation exists, appellee was duty bound to disclose all the facts to the appellant.

Thomas v. Whitney, 186 Ill. 225, 57 N. E. 808, 810.

"Fiduciary or confidential relation, as used in the law relative to undue influence is a very broad term. It has been said that it exists and relief is granted in all cases in which influence has been

acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in and relies on another."

See also:

Koehler v. Haller, 112 N. E. 527 (Ind.)

Miller v. Henderson, 33 Pac. (2d) 1098, 1102 (Kans.)

Patton v. Shelton, 40 S. W. (2d) 706, 712 (Mo.)

Beach v. Wilton, 91 N. E. 492 (Ill.)

Meyer v. Campion, 120 Wash. 457; 207 Pac. 670.

Under the Washington decisions, as long as fiduciary or confidential relations exist, appellant was not required to question the accounts, which were kept by the appellee under the contract, and were of a highly complicated nature as demonstrated by the contracts, Exhibits "B" (Tr. 47 at page 57 et seq) and "C" (Tr. 6 2at page 75 et seq) of appellant's Bill of Particulars.

Cole v. Utley, 188 Wash. 667, 63 P. (2d) 473.

Larson v. McMillan, 99 Wash. 626, 170 Pac. 324.

ARGUMENT

Under the well settled rule that upon the hearing of a demurrer or motion to dismiss, interposed by a defendant, the plaintiff is entitled to every reasonable inference to be derived from the complaint decided in his favor, the motion to dismiss must be overruled if it appears from the facts pleaded that appellant under the Washington Statute quoted above did not discover the facts constituting the fraud until within one year prior to commencing this action.

To justify his failure to discover the appellee's fraud, appellant alleged that appellee under the contract kept all the books and accounts and also that a fiduciary and confidential relation existed between the parties. This is the allegation of ultimate facts to be proved by appellant. If appellee had so elected it could have attacked the allegation by a motion to make more definite and certain or for a bill of particulars, but appellee elected not to do so. As against a motion to dismiss the allegations stand admitted. Appellant at all times continued to be a Senior Nylic of appellee and continued to draw Senior Nylic compensation and this relationship existed when this action was commenced, appellant only ceasing to be an active life insurance agent in August, 1936.

The terms "fiduciary or confidential relations" embraces in law any number of situations as the decisions well illustrate.

In addition to *Thomas v. Whitney*, cited above, see the following:

Miller v. Henderson, 33 Pac. (2d) 1098, 1102
(Kans.)

“Fiduciary relation does not depend on technical relation created by or defined in law, but exists in cases where special confidence has been reposed in one who, in equity is bound to act in good faith and with due regard to interests of one reposing confidence.”

Patton v. Shelton, 40 S. W. (2d) 706, 712,
(Mo.)

“Fiduciary relation not only includes all legal relations, such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, husband and wife, partners, *principal and agent*, trustee and cestui que trust, but it extends to every possible case in which a fiduciary relation *exists in fact* and in which there is confidence reposed on one side and resulting domination and influence on the other.” (Italics ours).

The provisions of Nylic No. 2 and the Agency Agreements reveal the unfair domination the defendant at all times retained over the plaintiff, and was at all times in a position to exercise.

The terms of “Nylic” are such that the Nylic Agent must at all times impose the utmost confidence in the defendant, with the appellee completely dominating the Nylic Agent. After the Nylic Agent spends twenty years in successfully qualifying as a Senior Nylic, and then does not retire under Senior Nylic Rules and de-

cides to continue for life in the service of the appellee (which was the primary objective of Nylic) the Senior Nylic imposes still greater confidence in the appellee than he did when he was a Qualifying Nylic Agent. Thus the Senior Nylic period accentuates the "Fiduciary Relationship" between the appellee and its Senior Nylic Agents.

In *Cole v. Utley*, 188 Wash. 667, 63 P. (2d) 473, plaintiff sued the defendant, her brother, to recover the sum of \$1,000.00 alleged to have been fraudulently withheld by defendant from plaintiff thirty years before when defendant sold a tract of timber belonging to his sister as his sister's agent. The existence of confidential and fiduciary relations was alleged. Plaintiff discovered the fraud a short time before commencing the action. The Court allowed the issue of confidential relationship and as to whether the plaintiff should have discovered the fraud to go to the jury.

In *Larson v. McMillan*, 99 Wash. 626, 170 Pac. 324, the plaintiff sued the defendant in an action for deceit and the principal question was whether the action is barred by the statute of limitations. The basis of the action was that the defendant had represented that he was unmarried when he married the plaintiff, although he was in fact then married. The court held the action did not accrue until investigation by the plaintiff disclosed his former marriage although some

time before she had discovered a letter telling of his family and other wife where the defendant denied any other marriage and the confidential and fiduciary relation continued until shortly before the action was commenced. In so holding the court said:

“There is as much, and more modern, authority to the effect that one who has been defrauded may bring an action after the fraud is discovered. To this latter theory the legislature has given its sanction. Rem. Code., Sec. 159, Subd. 4.

“We may grant that respondent had a cause of action when the marriage ceremony was performed, and that she had a cause of action at the time she discovered the letter from appellant’s son, but she was not bound to bring a suit unless she knew, or should have known, of the fraud. The law binds a party to the exercise of no more than “ordinary care” and “reasonable diligence,” and the wrongdoer cannot set up a lack of care or diligence when, by his concealments, he has lulled his victim to sleep upon his rights. The law intends that no one shall profit by his own fraud, or that the statute shall be seized upon as a means whereby a fraud is made successful and secure.”

The question involved on this appeal is presented purely from the adjective standpoint, that is to say, does the complaint state sufficient facts that the motion to dismiss should be overruled? Appellant submits that there is no fact stated in the complaint which would require appellant to investigate appellee’s representations or which would put appellant on notice of appellee’s alleged fraud since the motion to dismiss admits the existence of fiduciary and confidential re-

lations until the time of discovery of the fraud within one year of the commencement of the action. Many decisions will undoubtedly be cited by appellee but the court will note that in each of these decisions there is some fact appearing either on the face of the complaint or in the pleadings which ordinary prudence would require the plaintiff to investigate. The absence of any such fact on the face of the complaint taken together with the existence of confidential and fiduciary relation we submit require the overruling of the motion to dismiss in the case at bar.

WHEREFORE appellant respectfully submits that the order and judgment of dismissal of the trial court should be reversed with instructions to the district court to overrule the motion to dismiss and require the appellee to answer appellant's complaint.

Respectfully submitted,

CLARENCE J. COLEMAN.
J. C. BOLINGER
WELTS & WELTS
Attorneys for Appellant.

No. 10930

United States
Circuit Court of Appeals
For the Ninth Circuit.

EIVIND ANDERSON and CONTINENTAL
CASUALTY COMPANY, a corporation,
Appellants,

vs.

UNITED STATES OF AMERICA, for the use
and benefit of A. G. RUSHLIGHT & CO., a
corporation, and THE FIRST NATIONAL
BANK OF PORTLAND, OREGON, a Na-
tional Banking Corporation,
Appellees.

Transcript of Record

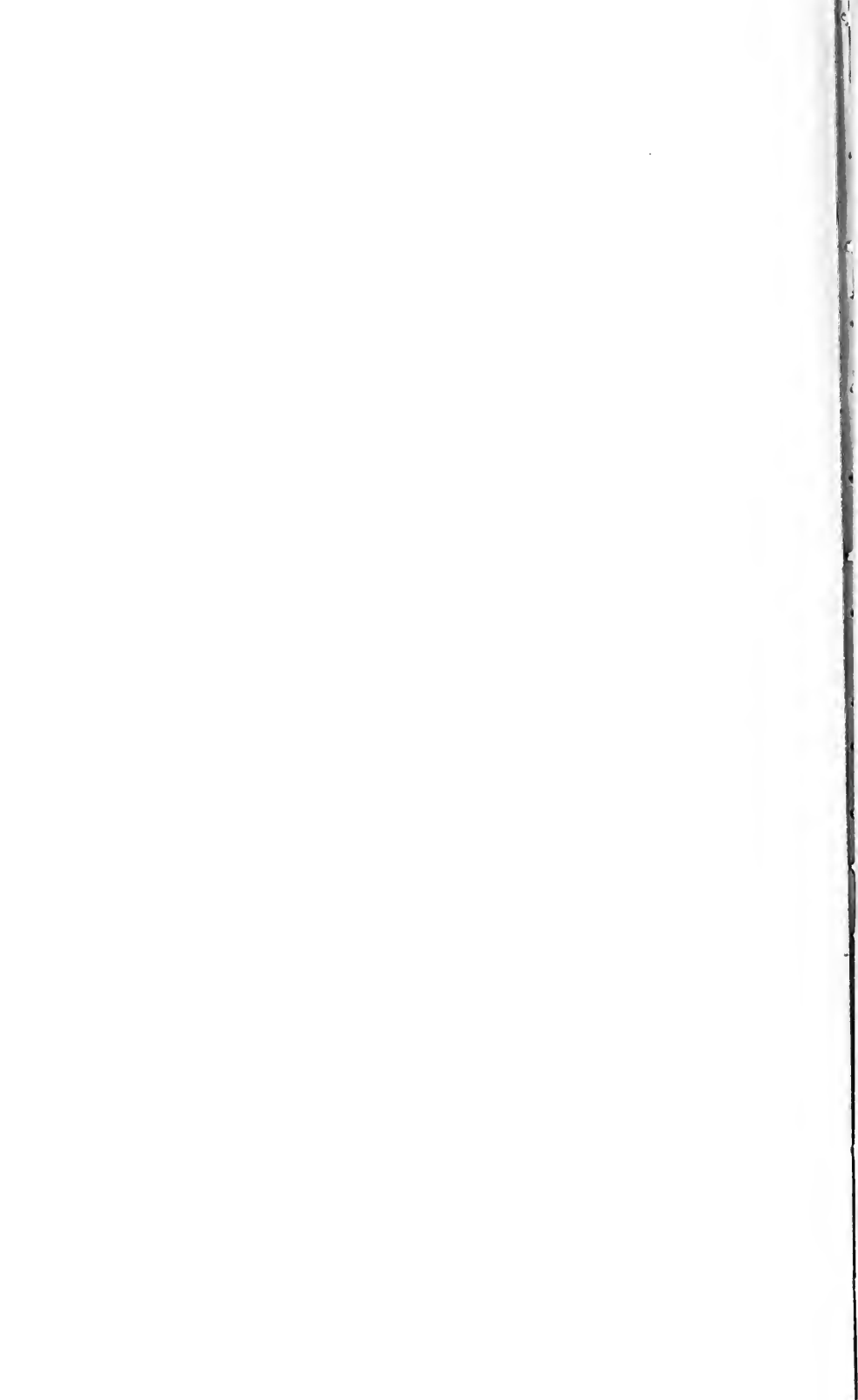
Upon Appeal from the District Court of the United States
for the Western District of Washington,
Southern Division

FILED

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PAUL P. O'BRIEN,
CLERK



No. 10930

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Attorneys for Plaintiff-Appellees.

In the District Court of the United States for the
Western District of Washington, Southern
Division

No. 424

UNITED STATES OF AMERICA for the use and
benefit of A. G. RUSHLIGHT & CO., a cor-
poration, and THE FIRST NATIONAL
BANK OF PORTLAND, OREGON, a Na-
tional Banking Corporation, and W. L. REID
doing business as W. L. Reid Company,
Plaintiff,

vs.

EIVIND ANDERSON and CONTINENTAL
CASUALTY COMPANY, a corporation,
Defendants.

COMPLAINT

Comes now A. G. Rushlight & Co., a corporation,
and The First National Bank of Portland, a Na-
tional Banking Association, and complain and al-
lege as follows:

* * * * *

V.

That under date of May 15, 1941, the defendant,
Eivind Anderson, and the plaintiff, A. G. Rushlight
& Co., entered into a subcontract, in writing,
wherein and whereby, for a consideration of \$293,-
000.00, the said Eivind Anderson employed the
plaintiff, A. G. Rushlight & Co., to do and perform
a portion of said Main Contract as follows: "Plumb-
ing, heating and mechanical installation work called

for by bid form, addenda No. 1 to 5, incl., special condition and drawings, and as further covered by specification sections: P. 1-P.21 incl.; ME 1-ME 15 incl.; H 1-H 17 incl.; TH-HV 1-TH-HV 17 incl.; HA 1-HA 7 incl., "all in accordance with the general conditions of said Main Contract between the United States and the said Eivind Anderson, and in accordance with the drawings and specifications prepared by the United States and made a part of said Main Contract.

* * * * *

That during the performance of said subcontract work, the defendant, Eivind Anderson, ordered and directed, and required the plaintiff, A. G. Rushlight & Co., to perform certain additional work and to furnish certain additional materials not required under said original subcontract, and said plaintiff, pursuant to said defendants' orders, directions and requests, [1*] furnished said additional work and materials, as follows:

(a) Furnished three air compressors for installation in said hospital unit, the same being of the fair and reasonable cost and value of \$1,568.00;

(b) Performed the work for the revision of power plant for the hospital group, at the fair, reasonable and agreed cost of \$12,118.47;

(c) Furnished electrical wiring, at a fair and reasonable cost and value of \$3,834.72.

* * * * *

*Page numbering appearing at foot of page of original certified Transcript of Record.

X.

That on January 6, 1942, the plaintiff A. G. Rushlight & Co., did in writing transfer and assign unto the plaintiff The First National Bank of Portland, as collateral security for an indebtedness, all sums of money due or to become due to said A. G. Rushlight & Co., from said Eivind Anderson or said Continental Casualty Company, under or in connection with or arising out of said subcontract, and did authorize said Bank to take any and all steps, acts and proceedings necessary or required to collect said sum.

Wherefore, the plaintiffs A. G. Rushlight & Co., and The First National Bank of Portland, Oregon, pray judgment against the defendants, and each of them in the sum of \$94,457.19, together with interest on said sum at 6% from October 1, 1941, until paid; and

Plaintiff, W. L. Reid, prays judgment against the defendants, and each of them, in the sum of \$987.48, together with interest thereon at 6% from September 5, 1941, until paid.

/s/ CALDWELL, LYCETTE &
DIAMOND

By /s/ JOHN P. LYCETTE

Attorneys for Plaintiffs

[Endorsed]: Filed Jul. 16. 1942. [2]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT

Comes now defendant Eivind Anderson in answer to the complaint of plaintiffs, A. G. Rushlight & Company and The First National Bank of Portland, Oregon, and by way of cross-complaint and counter-claim against plaintiffs, alleges as follows:

* * * * *

3. Answering paragraph VI of the complaint, defendant admits the part which reads: "That after the execution of said written sub-contract, the plaintiff, A. G. Rushlight & Co., entered upon the performance of the same"; and further answering said paragraph VI, defendant denies the same and each and every allegation therein contained except only as herein expressly admitted.

* * * * *

6. Answering paragraph IX of the complaint, denies the same and each and every allegation therein contained.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMAN

By /s/ W. E. EVENSON

Attorneys for Defendant
Eivind Anderson

[Endorsed]: Filed Sep. 11, 1942. [3]

[Title of District Court and Cause.]

ANSWER OF CONTINENTAL CASUALTY
COMPANY

Comes now the defendant, Continental Casualty Company and answering the complaint of the plaintiffs, admits, denies and alleges as follows:

* * * * *

3. Answering paragraph V of the complaint, this answering defendant admits that a subcontract between the defendant, Eivind Anderson, and the plaintiff, A. G. Rushlight & Co., was entered into, but denies any knowledge of the specific terms thereof, and for want of information and belief therefore denies the allegations of said paragraph V.

* * * * *

6. Answering paragraphs III, IV, V and VI, this answering defendant denies any knowledge or information of the allegations thereof sufficient to form a belief as to the truth thereof, and therefore denies the same.

Wherefore, Continental Casualty Company prays that plaintiffs' complaint be dismissed, and that this answering defendant recover judgment for its costs and disbursements herein to be taxed according to law.

SKEEL, McKELVY, EVENSON
& UHLMAN

By /s/ W. E. EVENSON

Attorneys for Defendant
Continental Casualty Co.

[Endorsed]: Filed Sep. 11, 1942. [4]

[Title of District Court and Cause.]

MOTION FOR LEAVE TO OPEN DEFENDANT'S CASE FOR TAKING OF FURTHER TESTIMONY

Now comes Eivind Anderson, one of the above named defendants and moves and petitions this Honorable Court for leave to re-open this case for the taking of further testimony on the Boiler House Revision item of \$12,118.47, as set forth and outlined in the attached affidavits, upon the grounds of newly discovered evidence, which could not, with reasonable foresight and diligence been discovered or obtained prior to or during the trial, and for the further ground of accident and surprise occurring at the trial against which reasonable diligence and foresight could not have guarded against.

This motion is based upon the affidavits of Clyde Philp, F. A. Urban, Eivind Anderson and Paul A. Olson, attached hereto and made a part of this motion.

/s/ HENRY ARNOLD PETERSON
 Attorney for Defendant

Copy received this 22 day of May.

LYCETTE, DIAMOND &
SYLVESTER

Attorney for Plaintiffs.

[Endorsed]: Filed May 23, 1944 [5]

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington,
County of Pierce—ss.

Eivind Anderson, being first duly sworn on oath deposes and says: That affiant is one of the defendants in the above entitled cause; that since the closing of the trial in the above case and the rendering of the Oral Memorandum Decision by the Court, affiant has made extensive search for evidence and testimony to expose the falsity of the testimony of W. A. Rushlight, the principal witness for the plaintiff in this case; that affiant discovered a witness, to-wit: Clyde Philp of Seattle, Washington, whose testimony is highly material particularly on the matter of plaintiffs' claim for extras in the sum of \$12,118.47, for revision of the boiler house; that the testimony of said Clyde Philp has been reduced to affidavit, duly executed by him and attached hereto; that the testimony in this case on the part of plaintiff particularly concerning this revision item took an unexpectedly (to this defendant) wide range and one that neither affiant nor his counsel could reasonably anticipate or guard against, and that both defendant and his counsel in that respect were taken by surprise against which the exercise [6] of reasonable care and diligence could not guard against; that said Clyde Philp, for some time following 1941, was a partner in business with said W. A. Rushlight and affiant believed that at the trial of the within cause said Clyde Philp was

then a partner of said W. A. Rushlight; that it was not until after the closing of the within trial that affiant learned of the various facts set forth in said affidavit of Clyde Philp; that the testimony of Clyde Philp has a direct bearing upon said claim by plaintiff for such extra revision item, and is highly material to the determination of said claim.

That said W. A. Rushlight has testified falsely in many particulars in this case, as shown by the attached affidavit of Clyde Philp; that said W. A. Rushlight testified unqualifiedly that he met affiant, Eivind Anderson, for the first time on April 8, 1941, or a few days prior thereto, and that he was then introduced to Eivind Anderson by the representative of the bonding company, which was Clyde Philp; that said testimony is absolutely false and W. A. Rushlight knew it was false when he so testified; that said W. A. Rushlight has been well acquainted with affiant for at least five years prior to the 8th day of April, 1941; that in November, 1936, affiant met with W. A. Rushlight in Portland, Oregon, particularly in connection with the submission of bids for the construction of the Oregon State Capitol at Salem, Oregon; that at that time affiant and his estimating staff had quarters at the New Heathman Hotel, Portland, Oregon, and that on the 19th day of November, 1936 (as shown by the attached letter and exhibit from A. G. Rushlight and Company) W. A. Rushlight personally delivered to affiant at [7] the New Heathman Hotel in Portland, a bid and estimate on the plumbing and heating job for the Oregon State Capitol, this estimate

and bid by W. A. Rushlight being submitted to Eivind Anderson, who was then preparing to bid for the Oregon State Capitol; that on the following day, to-wit: November 20, 1936, W. A. Rushlight was present with Eivind Anderson at the opening of the bids for the construction of the Oregon State Capitol, including the aforesaid bid prepared by Eivind Anderson, to which W. A. Rushlight had submitted an estimate the day before; that following said bid opening on November 20, 1936, W. A. Rushlight invited Eivind Anderson to the Multnomah Hotel in Portland, where Eivind Anderson and other persons were entertained by said W. A. Rushlight; that in 1937 affiant was constructing a post office building and called on W. A. Rushlight at his place of business in Portland and conversed with W. A. Rushlight on matters of subcontracting in that connection; that after said conversation W. A. Rushlight accompanied Eivind Anderson to the office of F. A. Urban, then of the Urban & Sinnott Plumbing and Heating Company in Portland, Oregon; that the said Urban & Sinnott Plumbing and Heating Company pursuant thereto obtained the plumbing and heating job from Eivind Anderson on that particular government contract; that again in 1940 affiant met with W. A. Rushlight at the Multnomah Hotel in Portland, Oregon, in connection with another bid opening involving a government contract at Pendleton, Oregon, and again at the Multnomah Hotel entertained Eivind Anderson and other contractors, including Clyde Philp, representative of the bonding company, and whose affidavit is attached hereto. [8]

That Clyde Philp, who wrote the surety bond both for Eivind Anderson and W. A. Rushlight on the contract in question further states in his attached affidavit that to his knowledge W. A. Rushlight was well acquainted with Mr. Anderson for at least two years prior to April 8, 1941.

That the attached affidavit of F. A. Urban further confirms the fact that W. A. Rushlight was well acquainted with Eivind Anderson for several years prior to April 8, 1941.

That said W. A. Rushlight testified unqualifiedly before this court that he met Eivind Anderson for the first time on April 8, 1941, or a few days prior thereto, and that he was then introduced to Eivind Anderson by the representative of the bonding company, Mr. Clyde Philp; that said testimony is absolutely false; that said testimony on the part of Mr. Rushlight shows his utter disregard for the truth, wherever he deems the contrary to be to his advantage.

W. A. Rushlight testified at the trial that his bid dated May 9, 1941, which is in evidence, was the original of that bid, and that copy thereof representing a bid or estimate of \$300,000.00, had been prepared by him on April 3, 1941; after conclusion of the within trial in checking over the vast number of papers in connection with this particular construction contract, affiant discovered the copy of the bid of May 9, 1941, filled in writing by W. A. Rushlight in the exact words and figures of the original, which is exhibited in this case, bearing date May

9, 1941; that said copy thus discovered by affiant is attached hereto; that affiant now recalls that when on May 9, 1941, W. A. Rushlight came to affiant's home he had with him duly filled in, two copies of said bid, one the original, which is on file [9] herein, and one a duplicate original (which is attached hereto) of said bid, and that W. A. Rushlight that night requested affiant to sign the attached copy as constituting a contract between the parties and said W. A. Rushlight drew the line thereon said duplicate original for affiant's signature; that affiant firmly believes that there never was any other copy of said bid of May 9, 1941, and that W. A. Rushlight designedly inserted the date of April 3, 1941, with the hope and purpose that affiant would not detect the date and that thereby said W. A. Rushlight would be able to claim the extra in question by having the proposed agreement predated to April 3, 1941, and affiant further states that the letters which were written by W. A. Rushlight to affiant following May 15, 1941, wherein he was claiming an extra for this revision was but a part of his plan, scheme and design to obtain such extra revision item, and that said plan, scheme and design was in existence with W. A. Rushlight on May 9, 1941.

(Signed) EIVIND ANDERSON

Subscribed and sworn to before me this 17th day of May, 1944.

(Seal) /s/ HENRY ARNOLD PETERSON
Notary Public in and for the State of Washington,
residing at Tacoma. [10]

AFFIDAVIT

State of Washington,
County of King—ss.

Clyde Philp, being first duly sworn on oath deposes and says: That affiant for several years last past has been and now is a resident of Seattle, Washington, is now and for many years last past has been, engaged in the Contract Bonding business.

That for a period between four and five years last past I have personally known Mr. W. A. Rushlight of A. G. Rushlight and Company of Portland, Oregon, and that during that time and on many occasions have transacted Contract Bonding with him and with many other contractors in the States of Washington and Oregon, including Eivind Anderson of Tacoma, Washington.

That on April 8, 1941, I furnished and delivered to Mr. Anderson, at his home in Tacoma, the bid bond required for a bid which he submitted for construction and completion of Temporary Housing, 400 Bed Hospital, Steam Distribution System for Hospital, Sanitary Sewerage System, Water Distribution System and Electric Distribution System at Fort Lewis and 41st Division Cantonment, Fort Lewis Military Reservation, Washington.

That on the said 8th day of April, 1941, at about one o'clock P.M. Mr. Anderson did compile and seal his bid in my presence, for the aforesaid military project, and thereupon I drove him in my car to the office of the Constructing Quartermaster at Fort Lewis, Washington, where all bids were properly

opened by Major E. P. Antonovich, Constructing Quartermaster in charge, and upon which it was found that the bid *if* Eivind Anderson was the lowest bid submitted; that Mr. W. A. Rushlight, President of A. G. Rush- [11] light and Company at Portland, Oregon, was present at said bid opening on April 8, 1941; that both Mr. W. A. Rushlight and Eivind Anderson, on April 8, 1941, were riding in my automobile from Tacoma to Fort Lewis to said bid opening; that while thus en route and in my automobile I did hear Mr. Rushlight inquire of Mr. Anderson as to whose plumbing and heating figure Mr. Anderson had used in his bid and what the amount of the bid was and I heard Mr. Anderson answer that he did not at the moment care to reveal what figure he had used or the amount, and I also heard Mr. Anderson ask Mr. Rushlight at that time, "Why didn't you get out a figure on this one?", upon which Mr. Rushlight remarked, "I did not have sufficient time to make up a close bid and did not want to throw you off but if you get the job I want to give you a figure".

At the conclusion of the bid opening there was no announcement of any contract award by the officer in charge. I was interested in the award of this contract to Mr. Anderson by reason of my bonding connections, and therefore endeavored to obtain information through Government channels on the matter of the award to Mr. Anderson of the contract. Within the two or three days following the opening of the bids at Fort Lewis on April 8, 1941, I made inquiries at Fort Lewis and also with the

Government at Washington, D. C., through my Surety Company representatives there, and was informed that no action had been taken and no recommendations had been made at that time by the Government.

That during the same interim, Mr. Rushlight made several calls over long distance telephone and urged me to induce Mr. Anderson to go to Washington, D. C., to get this con- [12] tract, and Mr. Rushlight said that he himself had to go to Washington for various business purposes, and could solicit assistance from Senator Holman for Mr. Anderson for such purpose; that he, Mr. Rushlight, was mad at the way the Fort Lewis officials were trying to give Mr. Anderson the run around, and said that he would also call Eivind Anderson and point out the necessity for making the trip to Washington, D. C.

That on May 9, 1941, I was in the company of Mr. Rushlight and Mr. C. C. Hall at Seattle on business dealings and in the late afternoon of that day they asked me to drive them to Mr. Eivind Anderson's place in Tacoma for the purpose of delivering to Mr. Anderson a bid for the plumbing and heating work on Mr. Anderson's 400 bed hospital project at Fort Lewis. I consented to do so and arrived at the Anderson home about 7:30 P.M., upon which Mr. Rushlight presented to Mr. Anderson a bid in writing for the plumbing and heating work in the amount of \$293,000.00. I distinctly recall that both the figures and the writing of \$293,000.00 were in ink and were in the bid when pre-

sented by Mr. Rushlight to Mr. Anderson at the house. I also distinctly recall that on our way to Tacoma that evening Mr. Hall, Mr. Rushlight and myself stopped on the highway for dinner. Mr. Rushlight mentioned the price of his bid to be \$293,000. At the Anderson home that evening there was no discussion of price whatever as both parties seemed satisfied and previously agreed upon \$293,000.00 to be the price to be paid for the plumbing and heating work on the 400 bed hospital project. There was some discussion that evening at the Anderson home about the furnishing and paying for a bond by [13] Mr. Rushlight and naturally I was interested in writing any bond that might be required. In fact, Mr. Rushlight, upon returning to Seattle, instructed me to procure such bond for him. I also was present with Mr. Rushlight in Anderson's home on May 15, 1941, when the sub-contract was signed by Mr. Rushlight and I subsequently delivered a Performance Bond to Mr. Anderson on behalf of Mr. Rushlight for the complete performance of his said contract. I can further state that for at least two years prior to the opening of the bid for the 400 bed hospital project at Fort Lewis on April 8, 1941, that Mr. Rushlight was well acquainted with Mr. Anderson and that he knows that he did not bid with Mr. Anderson on the 400 bed hospital project under call of bids of April 8, 1941.

(Signed) CLYDE PHILP

Subscribed and sworn to before me this 25 day of April, 1944.

(Seal) s/ GERALDINE K. ROHRDANZ
Notary Public in and for the State of Washington,
residing at Seattle.

Received copy this 22 day of May, 19....,
LYCETTE, DIAMOND & SLY-
VESTER,
Attorneys for Plf.

[Endorsed]: Filed May 23, 1944. [14]

[Title of District Court and Cause.]

OBJECTIONS OF DEFENDANT, CONTINEN-
TAL CASUALTY COMPANY, TO PRO-
POSED FINDINGS, CONCLUSIONS AND
JUDGMENT

Comes now the defendant, Continental Casualty Company, and submits to the court the following objections to the findings, conclusions and judgment proposed by the plaintiff.

* * *

4. Defendant objects to proposed finding X and each and every part thereof for the reason that the same is contrary to the evidence of the case in each and every respect.

* * *

8. Inasmuch as the matters objected to above and the findings are matters not sustained by the evidence and the proposed findings are in error, it follows that proposed conclusion II is in error as to

amount and also in error as to allowing interest for any time prior to the entry of judgment, the account being wholly unliquidated and reasonably in dispute up to the time of the actual entry of judgment.

* * *

SKEEL, McKELVEY, HENKE,
EVENSON & UHLMANN

By /s/ W. E. EVENSON

Attorneys for Continental
Casualty Co.

[Endorsed]: Filed May 29, 1944 [15]

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington,
County of King—ss.

W. A. Rushlight being first duly sworn on oath deposes and says: That he is President of A. G. Rushlight & Co., one of the plaintiffs above named; that he has read the affidavit of Eivind Anderson filed in the above matter bearing date of May 17, 1944.

That affiant denies the several allegations made in said affidavit to the effect that this affiant testified falsely at the trial of the above cause.

Affiant denies that he was acquainted with the said Eivind Anderson prior to April, 1941; that affiant admits that he had seen and met said Ander-

son on perhaps a number of occasions prior to said time but that said meetings were extremely casual; that the same were no other or different than seeing or meeting any number of persons interested in the contracting business; that affiant had no business or social contacts with said Eivind Anderson prior to April 1, 1941; that affiant may have given [16] bids to said Eivind Anderson on one or two occasions just as he has given bids to literally hundreds of different contractors who were strangers or virtually strangers to affiant; that if said Eivind Anderson were ever entertained by affiant then such entertainment was of a general nature in which contractors generally were being entertained and said Eivind Anderson just happened to be one of many contractors who attended.

Concerning the other matters in said affidavit of said Eivind Anderson affiant simply states that to the extent that the same are contradictory of testimony given by affiant at the trial that the same are untrue.

Referring to the affidavit of Clyde Philp dated April 25, 1944, affiant states:

Referring to lines 1 to 10 of page 2 thereof affiant denies the same.

Referring to lines 22 to 30 of page 2 of said affidavit affiant states that he may have talked to the said Clyde Philp by telephone about said time and in regard to the matter of going to Washington, D. C., but affiant denies that he requested the said Clyde Philp or anyone else to urge the defendant Anderson to go to Washington, D. C.

Referring to lines 2 to 24 inclusive of page 3 of said affidavit, affiant denies the same and each and every part thereof, and denies that the said Clyde Philp was present at said meeting on May 9, 1941.

Referring to lines 28 to 31 on page 3 of said affidavit and lines 1 to 3 on page 4 of said affidavit affiant denies the same.

Affiant further states that prior to the commencement of the above entitled action, and after the commencement of the above entitled action affiant discussed the matter [17] of said power house revision with said Clyde Philp and said Clyde Philp stated that he knew of his own personal knowledge that said power house revision was not included in the \$293,000.00 contract price of the plaintiff and further stated that said Eivind Anderson was trying to take advantage of plaintiff and "put one over" on affiant Rushlight; that the same statements were made by the said Clyde Philp to Mr. C. C. Hall in the presence of affiant.

That at the trial of the above case Mr. Urban, whose affidavit has been submitted herein was present as a witness for the defendant Anderson; that said Urban was there each day of the said trial; that at most, said Urban did not miss more than one day of said trial.

/s/ W. G. RUSHLIGHT

Subscribed and sworn to before me this 1st day of June, 1944.

(Seal) /s/ HERMAN HOWE

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed June 2, 1944. [18]

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington

County of King—ss.

John P. Lycette being first duly sworn on oath deposes and says: That he is one of the attorneys for the plaintiff A. G. Rushlight & Co.; that he has read the affidavit of Clyde Philp submitted herein under date of April 25, 1944. That affiant is well acquainted with said Clyde Philp and has been for a number of years past. That affiant has been in the office of the said Clyde Philp on many occasions.

That at all times material in the above entitled action, including all of the dates mentioned in the affidavit of the said Clyde Philp, and up to the present time, the said Clyde Philp has been an agent of the defendant Continental Casualty Company, a corporation; that the office of said Continental Casualty Company is now located, and for some years has been located in the 1411 Fourth Avenue Building in Seattle; that during all times material in the above action the office of said Clyde Philp was located in the office of the defendant [19] Continental Casualty Company and was so located

at the time the above entitled action was commenced and for some time thereafter; that a few (10 or 11) months prior to the trial of the above entitled action the said Clyde Philp moved his office out of the main office of said Continental Casualty Company and maintains the same on the same floor and directly adjoining the office of the said Continental Casualty Company. That said Clyde Philp is in and out of the said defendant's office many times each day; that said Clyde Philp uses the telephone number of the defendant Continental Casualty Company as a part of his listing in the telephone book.

That after the commencement of the above entitled action affiant discussed the above entitled action with said Clyde Philp and particularly discussed the matter of the revision of the power house and the contention of the defendant Anderson that said revision was included or intended to be included in the bid of \$293,000.00; that said Clyde Philp was very close to and familiar with the affairs of said Anderson and said Clyde Philp advised affiant emphatically that he knew that the extra cost of said power house revision was not included in the \$293,000.00 bid and figure of plaintiff Rushlight and that Eivind Anderson was trying to take advantage of the plaintiff Rushlight; that on Saturday, May 27th, affiant discussed said affidavit with said Clyde Philp and at said time said Clyde Philp again reiterated his statement that he knew that said power house revision was not included in the \$293,000.00 figure of plaintiff Rushlight; that

said Clyde Philp on said date, May 27th, further stated that he had previously and prior to the commencement of the above suit warned both Mr. Rushlight and Mr. C. C. Hall that Eivind Anderson was going to try and [20] take advantage of Rushlight on said power house work; that said Clyde Philp directed affiant's attention to the fact that the affidavit of Clyde Philp did not make any reference to that matter; that said Clyde Philp on May 27, 1944, advised affiant that if he were called to testify in the above case that he would testify that he knew that the extra cost on said power house was not included in the bid of the plaintiff Rushlight in the sum of \$293,000.00.

That on Friday, May 5, 1944, said Clyde Philp testified as a witness on behalf of the defendant Eivind Anderson in the Superior Court for Pierce County; that at said time the said Clyde Philp stated that the matters contained in lines 22 to 30 of page 2 of the affidavit of said Clyde Philp had been discussed with the defendant Eivind Anderson by said Clyde Philp shortly after their occurrence and long prior to the trial of the above entitled action.

Referring to the affidavit of Eivind Anderson dated May 17, 1944, affiant states that said Eivind Anderson had said additional copy of said bid dated May 9, 1941, with him at the trial of the above entitled cause and that during the trial of said cause affiant saw one additional signed copy of said bid of May 9, 1941, that is to say, one additional copy

beyond the one marked and admitted in evidence in the above cause.

Referring to the affidavit of Paul A. Olson dated May 18, 1944, affiant verily believes that the same is in no way material to any of the issues in this case, nevertheless that if there is any materiality in the same that the same was well known, or should have been well known, to the defendant Anderson long prior to the trial of this case; that affiant and Henry Arnold Peterson, the attorney for the defendant Eivind Anderson, had occasion to discuss the trip of Mr. Anderson and C. C. Hall to Washington, D. C., and [21] in a number of discussions between affiant and Henry Arnold Peterson, Mr. Peterson, while representing the defendant Eivind Anderson, advised affiant generally what he could prove and was going to prove in an action entitled "C. C. Hall vs. Eivind Anderson" then pending in the Superior Court for Pierce County, and involving said trip.

/s/ JOHN P. LYCETTE

Subscribed and sworn to before me this 1st day of June, 1944.

(Seal) /s/ HERMAN HOWE

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed June 2, 1944. [22]

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington

County of Pierce—ss.

Thomas W. Anderson, being first duly sworn on oath deposes and says: That affiant is of the age of Thirty-three years, is the son of Eivind Anderson and is Lieutenant Commander in the United States Navy and is in Tacoma on temporary furlough; that for the three years last past affiant has been in the continuous service of the United States Navy, stationed outside the State of Washington; that in the fall of 1940, affiant was present at the Winthrop Hotel in Tacoma with Eivind Anderson and W. A. Rushlight of Portland, Oregon, at which time Eivind Anderson, W. A. Rushlight and myself were preparing bids on various items of army construction at Fort Lewis, Washington; that affiant unqualifiedly states that at that time W. A. Rushlight was well acquainted with my father, Eivind Anderson, and at that time, in addition to working together in the preparation of bids, W. A. Rushlight personally entertained both of us by serving drinks in the room occupied by him at the Winthrop Hotel. At that time [23] items of construction interest were discussed with W. A. Rushlight for approximately one-half hour.

/s/ THOMAS W. ANDERSON

Subscribed and sworn to before me this 9th day of June, 1944.

[Seal] /s/ HENRY ARNOLD PETERSON
Notary Public in and for the State of Washington,
residing at Tacoma

[Endorsed]: Filed Jun. 9, 1944. [24]

[Title of District Court and Cause.]

OBJECTIONS OF DEFENDANT EIVIND AN-
DERSON TO PROPOSED FINDINGS,
CONCLUSIONS AND JUDGMENT

Comes now the defendant, Eivind Anderson, and submits to the court the following objections to the findings, conclusions and judgment proposed by the plaintiffs.

* * * *

4. Defendant objects to proposed finding X and each and every part thereof for the reason that the same is contrary to the evidence of the case in each and every respect, is in direct violation of the terms and conditions of said sub-contract between plaintiff and this defendant, bearing date April 15, 1941, is contrary to the law and that each and all of the work thus done and materials furnished by plaintiff is within and is covered by said sub-contract and is not an extra either in work or material.

* * * *

8. Inasmuch as the matters objected to above and the findings are matters not sustained by the evi-

dence and the proposed findings are in error, it follows that proposed conclusion II is in error as to amount and also in error as to allowing interest for any time prior to the entry of judgment, the account being wholly unliquidated and reasonably in dispute up to the time of the actual entry of judgment.

/s/ HENRY ARNOLD PETERSON
Attorney for Eivind Anderson

[Endorsed]: Filed June 21, 1944. [25]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

This matter having come on regularly for hearing before the undersigned Judge of the above entitled Court, the plaintiffs appearing through John P. Lycette of Lycette, Diamond & Sylvester, their attorneys, and the defendant, Eivind Anderson appearing in person and through his attorney, Henry Arnold Peterson, and the defendant, Continental Casualty Company, a corporation, appearing through its attorneys, Skeel, McKelvy, Hencke, Evenson and Uhlman, Mr. W. E. Evenson being present throughout the trial, and the parties having stipulated in open court that the Action be tried to the Court and that a jury trial be and was waived, and evidence having been taken and both sides having rested; arguments of counsel having been heard.

and the Court having pronounced its oral opinion, now therefore, the court does make the following Findings of Fact and Conclusions of Law:

* * * *

V.

That under date of May 15, 1941 the defendant, Eivind Anderson, and the plaintiff, A. G. Rushlight & Co., entered into a subcontract, in writing, wherein and whereby, for a consideration of \$293,000.00 the said Eivind Anderson employed the plaintiff A. G. Rushlight & Co., to do and perform a portion of said Main Contract as follows: "Plumbing, heating and mechanical installation work called for by bid form, addenda No. 1 to 5, incl., special condition and drawings, and as further covered by specification sections; P1 - P21 incl.; ME 1-ME 15 incl.; H 1-H 17 incl.; TH-HV 1-TH-HV 17 incl.; HA 1 - HA7 incl.;" all in accordance with the gen- [26] eral conditions of said Main Contract between the United States and the said Eivind Anderson, and in accordance with the drawings and specifications prepared by the United States and made a part of said Main Contract.

* * * *

X.

That prior to the submission of bid on April 8, 1941, the defendant Anderson had ascertained from the plaintiff Rushlight as well as from other subcontractors, in a reasonable degree of certainty, what his plumbing and heating costs would be, said figures being somewhere between \$286,000.00 and

\$314,000.00; that very shortly after the bid opening on April 8, 1941, the defendant Anderson knew that his bid would be rejected unless it was presented to some higher authority than the local Constructing Quartermaster; that the defendant Anderson called the plaintiff Rushlight some three or four days subsequent to the opening of bids and suggested that steps be taken to secure the contract; that an arrangement was made between the plaintiff Rushlight, the defendant Anderson, and Mr. C. C. Hall, attorney of Portland, Oregon, for a meeting at Spokane, and at said Spokane meeting further arrangements were made for the defendant Anderson and Mr. Hall to go to Washington, D. C. for the single purpose of securing said contract; that as said time the plaintiff Rushlight desired assurance that he would be given the subcontract for plumbing and heating and at said Spokane meeting the defendant Anderson gave the plaintiff Rushlight assurance that Rushlight would be given the subcontract for plumbing and heating if the contract were awarded to Anderson by the government.

[27]

That after the defendant Anderson and said C. C. Hall went to Washington, D. C. and received assurance that the Main Contract would be awarded to the defendant Anderson, said defendant Anderson decided that he was not under any obligation to give the subcontract to plaintiff Rushlight and made up his mind not to give the contract to Rushlight because plaintiff Rushlight expected the award of the subcontract to be for \$300,000.00; that thereafter a

meeting between the plaintiff Rushlight, the said C. C. Hall and the defendant Anderson was held on May 9, 1941 at Mr. Anderson's home in Tacoma, at which meeting the adjustment of the subcontract price was the primary and major subject of discussion; that as a result of that meeting a letter, Exhibit Ptf. 8 was signed, fixing the sum of \$293,000.00 as the contract price, which said sum was \$7,000.00 less than the amount plaintiff Rushlight insisted he was entitled to under the previous oral agreement and \$7,000.00 more than the defendant Anderson was willing to pay knowing that he could get the work done for \$286,000.00; that the word "revised" which was written on said letter, Exhibit Ptf. #8, was written thereon for the purpose of indicating a revision from the controverted sum of \$300,000.00 and \$286,000.00, and that said letter and said designation "revised" were not intended to cover a new and increased cost of construction in accordance with the Governments Modified program on the Power Plant;

That several weeks after the original bids had been submitted and opened the Government ordered a change in the construction of the Power Plant and immediately thereafter the plaintiff furnished the defendant Anderson with a written proposal to do the necessary changes in the plaintiff's part of the work for the sum of \$12,118.00; that on May 22 [28] by Ptf. Exhibit #11 the defendant Anderson directed the plaintiff to make the necessary changes in his subcontract work on the power house

and that the plaintiff Rushlight performed said work as required at a reasonable extra cost of \$12,118.00; that within a few days after said extra work was ordered, the defendant Anderson requested the plaintiff to furnish a break-down of the subcontract work, and that thereupon the plaintiff furnished to the defendant a written break-down of the contract work showing the extra cost of the power house as \$12,118.00 and stating "change order covering revision in Power Plant as per our proposal dated April 30, 1941, \$12,118.00; that the defendant Anderson knew that the plaintiff expected to be paid that amount as an extra for performing the said changed work; that the defendant did not reply to said break-down and at no time advised plaintiff that the changed work on the power house was to be done without extra compensation.

That the written subcontract of May 15, 1941, between plaintiff and defendant was not intended to cover and did not cover the additional cost of constructing the power house plant in accordance with the Government's modified or substituted plans and specifications; that the plaintiff is entitled to the sum of \$12,118.00 as an extra on the Power Plant.

Done In Open Court this 29 day of June, 1944.

/s/ CHARLES H. LEAVY

Judge [29]

From the foregoing Findings of Fact, the Court now makes the following

CONCLUSIONS OF LAW

*

*

*

*

II.

That the plaintiff A. G. Rushlight Co., a corporation, and the First National Bank of Portland, Oregon, a National Banking Corporation are entitled to judgment against the defendant Eivind Anderson and Continental Casualty Company, and each of them, in the sum of \$21,757.53 together with interest on \$9,639.53 of said sum from December 15, 1942 to date of this judgment, and interest on the whole of said judgment from the date thereof, together with their costs and disbursements herein to be taxed.

*

*

*

*

To which Findings of Fact and Conclusions of Law defendant excepts and exceptions allowed.

Done In Open Court this 29th day of June, 1944.

/s/ CHARLES H. LEAVY

Judge

[Endorsed]: Filed Jun. 29, 1944. [30]

In the District Court of the United States
for the Western District of Washington
Southern Division

No. 424

UNITED STATES OF AMERICA for the use and
benefit of A. G. RUSHLIGHT & CO., a cor-
poration, and THE FIRST NATIONAL
BANK OF PORTLAND, OREGON, a Na-
tional Banking Corporation, and W. L. REID
doing business as W. L. REID COMPANY,
Plaintiffs,

vs.

EIVIND ANDERSON and CONTINENTAL
CASUALTY COMPANY, a corporation,
Defendants

JUDGMENT

This matter having come on regularly for trial before the undersigned judge of the above entitled court on April 6, 1944 and the trial having been concluded on April 14, 1944, the plaintiff appearing by John P. Lycette, of the firm of Lycette, Diamond and Sylvester, and the defendant Eivind Anderson, appearing in person and through his attorney Henry Arnold Peterson, and the defendant Continental Casualty Company, a corporation appearing by Mr. W. E. Evenson of the firm of Skeel, McKelvy, Henke, Evenson and Uhlman, and the jury having *being* waived by stipulation made in open court by all parties: and evidence having been

taken, the court having announced its decision thereafter, findings of fact and conclusions of law having been made and entered, now therefore,

In accordance with said Findings of Fact and Conclusions of Law,

It Is Hereby Ordered And Adjudged that the plaintiff, A. G. Rushlight & Co., a corporation, and the First National Bank of Portland, Oregon, a National Banking Corporation be, [31] and they are hereby awarded judgment against the defendant Eivind Anderson and the defendant Continental Casualty Company, a corporation and each of them, in the sum of \$21,757.53, together with interest on \$9,639.53 of said sum from the 15 day of December, 1942 to the date of this judgment, and interest on the whole of said judgment from the date thereof together with their costs and disbursements herein to be taxed; and to which order, ruling and judgment the defendants except and their exceptions are hereby allowed.

It Is Further Hereby Ordered that the cause of action of W. L. Reid, shall be and the same is hereby dismissed with prejudice and without costs.

Done In Open Court this 29th day of June, 1944.

/s/ CHARLES H. LEAVY

Judge

Presented by

LYCETTE, DIAMOND & SYL-
VESTER

Attorneys for Plaintiffs

By /s/ JOHN P. LYCETTE

Copy received. Notice of presentation waived

W. E. EVENSON

Atty. for Cont. Cas. Co.

HENRY ARNOLD PETERSON

Atty. for Eivind Anderson

[Endorsed]: Filed Jun. 29, 1944. [32]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Now comes Eivind Anderson, above named defendant, and moves this court for its order granting the defendant a new trial herein for the following causes materially affecting substantial rights of this defendant and that the judgment entered herein on the 29th day of June, 1944, be vacated and set aside:

(1) Insufficiency of the evidence to justify the decision and judgment of the court and that said decision and judgment are against the law.

(2) Error in law occurring at the trial and excepted to at the time by this defendant.

(3) Accident and surprise which ordinary prudence could not have guarded against.

(4) Newly discovered evidence, material for this defendant which he could not with reasonable diligence have discovered and produced at the trial.

Dated this 6th day of July, 1944.

/s/ HENRY ARNOLD PETERSON

Attorney for the defendants

[Endorsed]: Filed Jul. 7, 1944. [33]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now Continental Casualty Company, a corporation, one of the defendants in the above entitled action, and moves the court for a new trial herein on the ground of error occurring in the course of the trial hereof and in the entry of the findings, conclusions, decisions and judgment of the court and on the grounds that there was substantial error in the rulings of the court at the trial upon the offers of evidence and in the reception of evidence and that the decision and findings of the court are contrary to law and contrary to the evidence and that the award to the plaintiffs is excessive and not supported by the evidence and that the denial of the cross claims of the defendant Anderson against the plaintiffs is in error and were not allowed in the full amount established by the evidence and by law.

/s/ W. E. EVENSON

One of the attorneys for the
defendant, Continental Cas-
ualty Company.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMAN,
Of counsel

Copy received this 7 day of July, 1944

LYCETTE, DIAMOND, SYL-
VESTER

Attorneys for Rushlight
Plaintiff

[Endorsed]: Filed Jul. 8, 1944. [34]

[Title of District Court and Cause.]

**ORDER OVERRULING MOTION FOR
NEW TRIAL**

This matter having come on regularly for hearing on the Motion of the defendants for a new trial, argument of counsel having been heard, and the Court having orally announced its decision denying said motion, now therefore,

It Is Hereby Ordered, that the Motion of the defendants for a new trial herein be, and the same is hereby denied. The exceptions of the defendants are hereby noted and allowed.

Done In Open Court this 3rd day of Aug., 1944.

/s/ CHARLES H. LEAVY
Judge

Presented by

**LYCETTE, DIAMOND AND
SYLVESTER**

Attorneys for Plaintiffs

By /s/ JOHN P. LYCETTE

Approved

/s/ HENRY ARNOLD PETERSON
Attorney for Defendant Eivind Anderson

Approved as to form only

/s/ W. E. EVENSON
Attorney for Continental Cas.
Co.

[Endorsed]: Filed Aug. 3, 1944. [35]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO NINTH CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given that defendants Eivind Anderson and Continental Casualty Company, a corporation, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from that portion of the final judgment entered in this action on the 29th day of June, 1944, awarding plaintiff judgment against defendants in the sum of \$12,118.00, which is a part of the \$21,757.53 set out in said judgment

W. E. DUPUIS and W. H. FER-
GUSON

Attorneys for Appellants Ei-
vind Anderson and Contin-
ental Casualty Company

Copy of the foregoing Notice of Appeal mailed to Messrs. Caldwell, Lycette & Diamond, Attorneys for Plaintiffs, Exchange Building, Seattle, Wash- ington, this 23rd day of September, 1944.

E. E. REDMAYNE,
Deputy Clerk

[Endorsed]: Filed Sept. 22, 1944. [36]

[Title of District Court and Cause.]

ORDER RE. EXHIBITS ON APPEAL

This Matter coming on before the Honorable Charles H. Leavy, one of the judges of the above en-

titled court upon motion of attorneys for appellants, to have those original exhibits set forth in the designation of contents of record on appeal inspected by the Circuit Court of Appeals for the Ninth Circuit in lieu of copies, and the court being fully advised in the premises,

Now, Therefore, It Is Hereby Considered, Ordered And Adjudged that those original exhibits set forth in the designation of contents of record on appeal be sent to the Clerk of the Circuit Court of Appeals for the Ninth Circuit by the Clerk of this court and that said Clerk shall not be required to make copies of said exhibits for the record, but that the Clerk withhold transmission of said original exhibits to the Circuit Court of Appeals pending preparation of briefs.

Done In Open Court this 1st day of Nov., 1944.

CHARLES H. LEAVY

District Judge

Presented by:

W. H. FERGUSON

Of Attorneys for Appellants

Approved:

HERMAN HOWE

LYCETTE, DIAMOND & SYL-
VESTER,

Of Attorneys for Respondents

[Endorsed]: Filed Nov. 1, 1944. [37]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript, consisting of pages numbered 1 to 35, inclusive, together with the original Reporter's transcript of Evidence, in three volumes, consisting of pages numbered 1 to 781 (transmitted in full), is a full, true and correct copy of so much of the record, papers and proceedings in Cause No. 424, United States of America for the use and benefit of A. G. Rushlight & Co., a corporation, and The First National Bank of Portland, Oregon, a National Banking Corporation, and W. L. Reid doing business as W. L. Reid Company, Plaintiff-Appellees, vs. Eivind Anderson and Continental Casualty Company, a corporation, Defendant-Appellants, as required by Appellants' Designation of the Contents of the Record on Appeal and the Additional Designation of Contents of the Record on Appeal of Appellees, on file and of record in my office at Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from the Judgment of the United States District Court for the Western District of [38] Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the original Reporter's Transcript of Evidence, consisting of pages numbered 1 to 781, inclusive, are herewith transmitted to the Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the aforesaid Transcript of the Record on Appeal, to-wit:

| | |
|--|----------|
| Appeal fee | \$ 5.00 |
| Clerk's fee for preparing, comparing and certifying record on appeal | 14.00 |
| | <hr/> |
| | \$19.00, |

and I further certify that the said fees, as above set out and been paid in full.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the city of Tacoma, in the Western District of Washington, this 15th day of November, 1944.

[Seal]

JUDSON W. SHORETT,

Clerk

By E. E. REDMAYNE

Deputy [39]

In the District Court of the United States, for the
Western District of Washington, Southern
Division

No. 424

UNITED STATES, for the use and benefit of A.
G. RUSHLIGHT & CO., et al,

Plaintiffs,

vs.

EIVIND ANDERSON, and CONTINENTAL
CASUALTY COMPANY,

Defendants.

PROCEEDINGS [1*]

Mr. Lycette:

There was another large item, the power plant which was originally provided for, to help Your Honor on those, those are found on page 4 of my Complaint, they are drawn together there. The power plant as originally planned was changed very soon after the contract was signed. In fact, the change was initiated before Anderson was actually given the contract. The revision of the power plant involved an item of \$12,118.47. That was the evidence will show of course that was paid to Mr. Anderson by the government. [5]

Now the power plant will require just a little more detailed explanation because that is the largest item. The original specifications have a section dealing with it, which is called there the M. E. or Mechanical Equipment specifications, and they

*Page numbering appearing at foot of page of original Reporter's Transcript.

cover the detail for the power house, boiler rooms and so forth. These specifications of course, were out early, probably before April, and in order that the bidding might be done. Then the bid was upon those original specifications and went in on April—was opened on April 8th. We had [7] theretofore supplied Mr. Anderson with an estimate of what we would do all this work for, which he used in making his bid to the government in order to get the contract.

After April 8th, when the bids were opened, until the time Mr. Anderson was officially advised of the awarding of the contract to him—I think on May 8th, and told to go ahead—I might stop there, just to say that he did not actually get a signed contract until—oh, I think July 8th or 10th. The government is always very late in getting the contracts out. What they do is say, “You have been awarded the contract, and go to work as of this day and your time will start as of this day”.

Now receiving that letter on May 8th when the bids were opened, the engineers submitted a letter to Mr. Anderson suggesting that they would like to have a proposal from him on a different type of boiler house, and they put out at that time a new set of Mechanical Instructions or M. E. Instructions. That section supersedes the section which was in the original set of specifications. It called for quite a different form of boilers and boiler house and power plant. So that came out on April 30th.

The evidence will show that Mr. Anderson and Mr. Rushlight got together to see what they could figure on that and I think that the planning work figure was all done in the Winthrop Hotel here in Tacoma. As a result of that Mr. Rushlight for Mr. Anderson, prepared a revised schedule upon—in letter form, in which he set up the costs that he had for the original boiler [8] system and then what it would cost for the new or changed system and what the extra expense would be, which was \$12,118.00, the amount which we sued for it. This letter was furnished to Mr. Anderson with a number of copies. Mr. Anderson had part of the changed work to do himself—a rather substantial portion of it. He, with Mr. Rushlight had made up a cost sheet showing the work that Mr. Anderson would have to do. Then Mr. Anderson made up a letter with Mr. Rushlight's assistance—I think Mr. Rushlight actually dictated the letter—I am not certain of that, which combined the two items, showing Mr. Anderson's work first in the letter, and then Mr. Rushlight's part of it for \$12,118.00 as a lump sum, but attaching to it a copy of the breakdown of Mr. Rushlight's making up the twelve thousand dollars.

That letter of Mr. Anderson's, containing the whole matter, with Rushlight's letter attached as an Exhibit A to it, was then submitted, I think, as of April 30th,—it was all done very rapidly—to the Constructing Quartermaster, and within a couple of days that was accepted by the Construction Quartermaster and in due course they were instructed and ordered to go ahead and do that work, and Mr.

Anderson gave us his letter advising us when—just exactly when we were to consider that change in effect. His letter came to us, or is dated, advising us that the revised specifications and the new plan as submitted, that letter was dated May 15th. No, I say May 15th—no, I think it was May 20th or a little later than that.

In the meantime our sub-contract was signed [9] by Mr. Anderson. Our proposal was delivered to him—formal proposal to do the work for the main contract for \$293,000.00. A few days later Mr. Anderson gave us a letter saying he accepted our main proposal of \$293,000.00 and that he would prepare a written sub-contract, which he proceeded to prepare and that main sub-contract is dated May 15th. I want to try to make those dates clear, because our notification of the acceptance of the revised power plant came at some date subsequent to that.

Mr. Anderson, as far as I am now able to determine now, takes the position that the revision of the power plant was to be included, or was included in our original bid, or should have been, by reason of the dates.

Our evidence will show that the first time he ever questioned the payment of that \$12,118.00 item was in his Answer in this case; that he had never questioned it before. Our evidence will show that we have submitted statements to him from time to time, including that item as a separate item, and that he never at any time, either orally or in writing, made the contention that he now makes.

The Court: Is it your contention that the twelve

thousand dollar item measures the entire change that the army or the government authorities directed?

Mr. Lycette: Well, it measures our portion, but it is very clearly broken down and set forth in our letter to Mr. Anderson, and Mr. Anderson's letter to the government. Our letter is attached to his, and this work was done under the Mechanical specifications which were [10] substituted for the original one, and our sub-contract with Mr. Anderson states upon its face that we are to do certain work, and then it refers to the specifications for what we are to do. We are to do the plumbing, and they use the initial "P" for plumbing, P-1 to 17, "H" for heating, pages 1 to 19, or something of that nature, and then theatre "TH" figure used there covers some heating and plumbing to do in the theatre building. This revision work is not included nor specified in our written contract with Mr. Anderson. I think that will develop very clearly as we progress. That covers the revision of the power plant item. [11]

But we get now, if Your Honor please, to their main item, and they take a very novel position in that to say the least, on that one involving the changes in the boiler house, which is some twelve thousand dollar item, and if Your Honor will follow just the dates of that situation, the contract—I think the bids were made in April. The government has a certain time in [24] which to consider the bids on the main contract, but before the main contractor—the contract between the government

and Anderson was let, if Your Honor please, that was let—they finally orally agreed to it in May, but before it was done the government concluded that they wanted the boiler house revised—that was before any contract was awarded to us at all by the government. Mr. Rushlight had been in communication with the government long before he had any contract with us—30 days before—40 days before, and he had discussed with them apparently the revision, so on April 30th, more than nine days before he made this proposal for this job,—he didn't have any contract with us at all, he went out and he made an itemized statement as to what it would cost under the original bid and what the revised list would come to. One is the regular and one is the revised. This is on April 30th of that contract year.

Then Mr. Anderson—naturally Mr. Rushlight was interested in Anderson getting the contract, out there, because he wouldn't get any sub-contract if he did not. At least, he wouldn't even have a chance, so on May 6th, if Your Honor please—that is about a week later after that, the formal order was signed,—on May 6th before the sub-contract was ever made, Mr. Rushlight and Mr. Anderson go out to Fort Lewis to find out whether this revision was satisfactory and whether it had been agreed on, because the government wanted the revision to go through before they issued any contract to Mr. Anderson. On May 6th,—then, if Your Honor please, they agreed on the revision at Fort Lewis, and Mr. [25] Rushlight was present with Mr. Anderson, and came into Tacoma, and one of the main things in

the changes in that boiler house revision was the increasing of the size of the boiler. They reduced from three to—instead of three smaller ones, they had two larger ones. That is the main item. On May 6th, after they came back, and with the revised figures, naturally they were not going to put in the three, they put in the two—Mr. Rushlight, in the presence of Mr. Anderson, ordered—he told him that he would do the job orally then for \$293,000.00 —“My bid will be \$293,000.00”, and he went ahead, before any formal order now for the sub-contract—this was all before the sub-contract was made, and he went ahead and ordered in Tacoma here, these revised boilers—Mr. Rushlight did, and Mr. Anderson says “Now you submit a formal proposal—a formal proposal so we will know where we stand”, and on May 9th Mr. Rushlight submitted his formal proposal to Mr. Anderson to do the job for \$293,000.00, Your Honor, please. He sets out the original work that was to be done and then he marks it right on the letter “revised”.

Now that was on May 9th, and gives it to Mr. Anderson, and Mr. Anderson next day formally accepts the proposition for \$293,000.00. At that time the revised boilers had already been ordered by Mr. Rushlight. He knew that the three boilers were not to go in, but it was to be the two. [26]

I first would like to have marked and offered in evidence as plaintiff's 1, a certified copy of the contract of Mr. Anderson with the contract documents. It does not contain the specifications. It contains all the other contract documents. In that connec-

tion I might say, Your Honor, that the statute under which this [46] suit is brought, expressly provides that in bringing the suit the claimant, material or labor claimant may write to the——

The Court: Library of Congress.

Mr. Lycette: Some secretary and get a certified copy, and this is it, with a big beautiful seal on it.

The Court: Any objection, Mr. Peterson?

Mr. Peterson: No, if I could just see it a moment.

If Your Honor please, I do not think it is necessary to take the time. We have the original in our possession, and if there should be any additions or things subtracted from that, we can probably handle that by motion rather than take the time now.

Mr. Lycette: That will be very satisfactory.

The Court: It will be admitted in evidence.

(Whereupon contract documents were received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. Lycette: Then I would like to call Mr. Anderson. [47]

EIVIND ANDERSON,

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lycette:

Q. Your name is Eivind Anderson?

A. That is right.

(Testimony of Eivind Anderson.)

Q. And you are the defendant in this case?

A. That is right.

Q. You are the contractor who entered into the contract with the United States Government for the construction of this four hundred bed hospital that is involved in this litigation? A. That is right.

Q. Mr. Anderson, when was your bid submitted to the United States Government?

A. There were two bids submitted to the United States Government.

Q. Well, before the contract—we will take them one at a time, then.

A. The first bid was submitted on, as I recollect, on April 8th, 1941.

Q. That is a written bid, is it not, and is the bid which I will just show you.

(Handing paper to witness.)

The bid to which you refer is the bid found in Plaintiff's Exhibit 1, is it not?

A. It appears to be that. I have got the original over in my file. It is not written up in this specific form as I can recollect it, but it might consist of the same [48] items.

Q. Now, what was the amount of your original bid?

A. The total of that original bid was \$936,517.00. There was, however, two bids involved in that. I mean, there was bids submitted on two different propositions. One was to construct twenty-nine buildings for a certain amount of money, and the other bid in there was to construct the remainder

(Testimony of Eivind Anderson.)

of the seventy-two buildings that were involved, the entire project.

Q. Well, then, after that bid was submitted, the bids were opened on the same day, April 8th, were they not?

A. They were opened on the same date, that is right.

Q. Your bid was the lowest bid, was it not?

A. I believe that is true.

Q. Your bid was not immediately accepted by the Government, was it, Mr. Anderson?

A. Well, it was accepted within the thirty days limit, that is provided for the Government to accept or reject the bid.

Q. Well, you were told at that time the Government was not going to accept your bid, it was going to give it to a higher——

A. No, I was never told.

Q. You were never told that? A. No.

Q. You in fact took a trip to Washington, D. C.——

Mr. Peterson: I object to that as a matter of the contract being wholly immaterial. Here is the contract and based on that is the sub-contract and it seems that the matter that controls between these parties after [49] all is the sub-contract between Mr. Anderson and Mr. Rushlight.

The Court: Well, based upon the opening statement as made this morning. I think it might be material that there are certain alterations and changes that were directed before the execution of the bid,

(Testimony of Eivind Anderson.)

and before the letting of the sub-contract. That was part of the opening statement made by Mr. Lycette.

Mr. Lycette: I think we both made it.

The Court: Objection will be overruled and exception allowed.

(Question read.)

Q. (Continuing): —Washington, D. C. with Mr. Rushlight's attorney for the purpose of getting the War Department to award this contract to you on your low bid?

A. No, I did not take a trip to Washington for that particular purpose, except to find out what they intended to do with the contract, if they were going to award it or not.

Q. Well, when was that taken?

A. Oh, that was taken shortly following after the bidding.

Q. How long after the bidding?

A. I would say about—perhaps three or four days or five days, something of that kind.

Q. Well, the bids were opened, yours was the lowest bid. Three or four or five days later you and Mr. Rushlight's lawyer went to Washington, D. C., is that correct?

A. I went to Washington.

Q. Didn't Mr. Rushlight's attorney, Charlie Hall—

A. I didn't know whether he was his lawyer or not, but he went back on the same trip—as I recall it, he boarded [50] the plane in Spokane and went back, as he told me, on other business.

(Testimony of Eivind Anderson.)

Q. Well, you paid his expense back, didn't you?

A. I did not.

Q. Didn't he accompany you around from one war office—this is Mr. Charlie Hall, C. C. Hall, of Portland, Oregon, did he not accompany you around from office to office, take you from office to office in Washington, D. C., on that trip in connection with this contract?

Mr. Peterson: I don't want to be in a position to object here, but I can't understand how that would be material as long as the contract was later awarded, and to Mr. Anderson, whether or not he done Washington, D. C., unless it pertains to some phase of this sub-contract.

The Court: I am assuming it will be, if it does not the objection will be overruled and exception allowed.

A. My purpose of going to Washington?

Q. I did not ask you that, I asked you if Mr. Hall did not take you around from office to office in the War Department at Washington, D. C., after the two of you got there, for the purpose of discussing this contract?

A. I will ask you to give some clarification of what you mean, that somebody took me around from office to office.

Q. Well, did you not accompany Mr. Hall from one office of the War Department to another for the purpose of discussing the giving or awarding to you of this contract on your bid?

A. As I recall it, the trip to Washington, Mr.

(Testimony of Eivind Anderson.)

Hall explained [51] that he was the campaign manager for Senator Holman, and if I needed any assistance in getting recognition or help to locate the proper officials in Washington, that he would be glad to introduce me to Senator Holman for such assistance, and as I recall, I told Mr. Hall that it was perhaps not necessary to do that because of the fact that I had been in Washington many times myself and I knew quite a bit about the functioning of those offices, and furthermore, that I expected to get assistance from Congressman Coffee, if there was any assistance that I needed, but, however, I will add that Hall actually did go with us, me and Mr. Paul Olsen, Secretary of the Congressman, to introduce some of those parties there that had the awarding of this contract.

Q. All right, now, just to go back a bit, before you gave your bid to the Government on April 8th, you had from Mr. Rushlight a proposal to do the heating and plumbing work on this job, did you not?

A. No, I did not.

Q. I will ask you if he did not give you a figure of three hundred thousand dollars to do that work prior to the time your bid was given—this was orally.

A. No, I have no recollection of that at all.

Q. Now, after you had been to Washington, D. C., the trip on which Mr. Hall was there, you came back to the Coast, did you not?

A. Yes, I returned to the Coast.

(Testimony of Eivind Anderson.)

Q. And then when did the Government advise you that the contract was awarded to you?

A. I believe the exact date on that was May 6th. [52]

Q. I will call your attention to—there is a letter in the file, Exhibit 1, dated May 6th, 1941, from Major Antonovich, Constructing Quartermaster, directed to you in which it is stated, “In accordance with the terms of your bid, dated April 8th, 1941, for the constructing of temporary houses”—and then it goes on to describe it—“which bid was accepted by the Government on May 5th, 1941, you are hereby given notice to proceed with the work provided therein”.

Is that correct, does that refresh your memory? Is that correct?

A. I think there is such a letter, yes.

Q. You accepted and signed the letter, did you not, of May 6th—I will give you—have it called to your attention. See if that is not your signature, a correct copy of your letter and your signature on it, right down in the lower corner?

A. May the 8th, my signature appears on the corner on May the 8th.

Q. Now, that is your notification that your bid is accepted and for you to proceed to work, is it not?

A. Yes.

Q. Now, in connection with the contract, Mr. Anderson, you have, there is a set of specifications, are there not?

A. Yes, there is.

(Testimony of Eivind Anderson.)

Q. Will you kindly produce the specifications?

A. We have copies of those specifications.

Mr. Peterson: Mr. Lycette, we have attached these thumb things here just for the indication to show what subject they referred to. [53]

Mr. Lycette: I have not checked those over, but I take it it will be understood I am not bound by—

Mr. Peterson: That is just an index on the outside. That will aid you to find those subdivisions.

Q. I will now show you Plaintiff's Exhibit 2 for identification, and I will ask you if that is the set of specifications upon which the job was originally bid? A. That is right.

Q. Those specifications with a few minor exceptions remained in force and effect throughout the entire contract, did they not? A. They did.

Mr. Lycette: I would like to offer them in evidence, Your Honor.

Mr. Peterson: No objection.

The Court: They will be admitted in evidence.

(Whereupon specifications referred to were received in evidence and marked Plaintiff's Exhibit No. 2.)

Mr. Peterson: If Your Honor please, I have an extra copy, so if the Court would like to have those before him, he can have those and I have another copy here. I have two sets, so we can use this one and the Court will have one.

Q. Now, Mr. Anderson, after your bid had been submitted and prior to the—strike that.

(Testimony of Eivind Anderson.)

Is there not another set of specifications, a small separate set of specifications that was issued in connection with the job?

A. I don't recall of any. [54]

Q. I will ask you if a separate set of specifications covering the mechanical equipment were not issued after the call for bids had been given?

A. No, I don't really recall any one that was issued, particularly, for this job.

Q. Do you recall when you were asked by the Government to bid upon a change in the heating plant and boiler house, do you recall that?

A. Yes, that was about—I believe on April 26th of 1941, the same month.

Q. Have you the letter, Mr. Anderson, of April 26th, 1941, from Major Antonovich to you, inviting the proposal from you for a change on the heating and boiler house?

A. I believe it is one of the letters in the file.

Mr. Peterson: What is the date?

A. April 26th.

Mr. Lycette: April 26th, 1941.

If Your Honor please, this is off the record, just to aid you. I am now working primarily on the matter of the twelve thousand dollar item in our—

The Court: I assumed you were.

Mr. Peterson: If Your Honor please, we have a complete file here of every Government letter. They were always marked serial letters, every letter we received from the C. Q.—the Constructing Quartermaster, they are marked serially and our answers

(Testimony of Eivind Anderson.)

thereto are serially numbered also, and I wondered if we might retain the original in the files until the matter can be completed, because there are many matters these letters may be pertinent to, and supply copies. [55]

Mr. Lycette: Have you a copy?

Mr. Peterson: I can give you a copy.

Mr. Lycette: If you will give me a copy, that will answer my purpose.

Mr. Peterson: Or, if Your Honor please, we can disconnect, if we would have the right to substitute copies for them later.

Mr. Lycette: I will have no objection to that.

The Court: Yes, you would have that right.

Mr. Peterson: We will take this one out.

Q. I will show you now what I am having marked Plaintiff's Exhibit 3 for identification.

A. This is the letter.

Q. That letter you received from Major Antonovich? A. That is right.

Q. Major Antonovich was the Government officer in charge of this construction from the beginning until the end or practically the end of the work, was he not?

A. He was the constructing quartermaster.

Mr. Lycette: I would like to offer this letter in evidence as Plaintiff's Exhibit 3.

The Court: It will be admitted with the stipulation it may be withdrawn and a copy substituted.

(Whereupon letter referred to was received in evidence and marked Plaintiff's Exhibit No. 3.)

(Testimony of Eivind Anderson.)

PLAINTIFF'S EXHIBIT No. 3

HHG:AM

War Department
Office of the Constructing Quartermaster
Fort Lewis
and Vicinity
Fort Lewis, Washington

April 26, 1941

Mr. Eivind Anderson
517 North I Street
Tacoma, Washington

Dear Sir:

Reference is made to the heating plant for the 400 Bed Hospital at Fort Lewis which was included in proposal submitted by you on April 8, 1941, under Invitation No. 6105-41-79.

It is requested that you submit a supplementary proposal covering the omission of the heating plant and Boiler House, Type HBH-13 as shown on Field Drawings Nos. 610-R, 611-R, 612 and Plan Nos. 700-1500, Rev. A, 700-1501 and 700-243 Rev. A to E, inclusive, and as described on Pages ME-1 to ME-15, inclusive, Specification No. Fort Lewis—32, and substituting therefor the heating plant and Boiler House, Type HBH-16, as shown on Plan Nos. 700-1517, Revisions A to E, inclusive, 700-1517.1 Rev. A, 700-1518 Rev. A and B, 700-1519 Rev. A and B, 700-1520 Rev. A, 700-1521 Rev. A and 700-243 Rev. A to E inclusive, and as described on pages

(Testimony of Eivind Anderson.)

ME-1 (sub) to ME-14 (sub) of Specification No. Fort Lewis—32.

No change will be made in the Heating Distribution System except such modifications described in pages ME-1 (sub) to ME-14 (sub) and as may be necessary for connections, etc. to the heating plant.

The proposal shall cover all work and material necessary to insure a satisfactorily operating system that is complete in every respect and detail. In addition to the substituted Mechanical Equipment section of the Specifications, all other applicable sections of Specification No. Fort Lewis—32 shall apply to this substitute work.

Your proposal shall cover the additional cost in event the heating plant and boiler house as mentioned herein is substituted for the heating plant and boiler house called for in the original invitation for bids.

Yours very truly,

E. P. ANTONOVICH

E. P. Antonovich,

Major, Q. M. Corps, Constructing Quartermaster

[Endorsed]: Filed Apr. 6, 1944.

Mr. Lycette: I do not know what Your Honor prefers, reading these as they go in—

The Court: Unless you particularly desire to have them read into the record, I prefer not to take the time. [56]

(Testimony of Eivind Anderson.)

Mr. Lycette: I do not want to have them read in, just the order of the thing.

Q. Now, in response——

The Court: In connection with this letter, I would like to ask the witness if he received it on the date it bears date. It seems to have been written at Fort Lewis April 26th.

A. I do, as I recall, Your Honor. I received that letter handed to me at Fort Lewis on that date.

Q. Now, following that, the receipt of that letter, Exhibit 3, you prepared a proposal, did you not, and submitted it to Major Antonovich under date of April 30th, 1941, in response to that letter?

A. I am sure I responded to the letter. I don't recall the exact date except I refer to my file.

Mr. Lycette: Will you produce a copy of your letter?

Mr. Peterson: Of what date?

Mr. Lycette: April 30th, 1941, to Major Antonovich, in response to that letter.

Mr. Peterson: I don't think there is any letter of that date. I think you will have to re-check that.

Mr. Lycette: I have a signed copy of it.

Mr. Peterson: Let me see the copy. I have no record in my file. You will have to find out from the witness. Ours is dated May 6th.

Q. I will show you now what is marked Plaintiff's Exhibit 4, for identification, and I will ask you — it consists of two sheets — I will ask you if sheet No. 1 is not a letter written by you, and if that is not your original signature [57] on the

(Testimony of Eivind Anderson.)

letter? Well, first, just answer, is that your original signature? A. I could not say.

Q. You say you can't say whether that is your signature on the letter?

A. I don't recall the letter.

Q. Now, just leave that alone, that is your signature?

A. I can't say positively it is my signature.

Q. Do you deny that is your signature?

A. I don't deny it. It may and it may not be, but since I can't connect it up in reality with anything that I submitted to the Constructing Quartermaster on this subject, it is difficult for me to say that this is actually my signature.

Q. Then, look at the second page of that letter that I have given you and I will ask you if you recognize that as a letter—first, do you recognize this signature on that letter as Mr. Rushlight's signature?

A. Well, that might be equally difficult. I am not a handwriting expert. I would not say that—I would not positively say that I recognize those signatures.

Q. Did you or did you not send this letter that I have marked as Plaintiff's Exhibit 4, and which you have just examined?

A. I couldn't say.

Mr. Peterson: Mr. Lycette, I think I can clarify that. I don't know what letter, but here is the Government's, that answered the letter that it re-

(Testimony of Eivind Anderson.)

ceived from Mr. Anderson, and that is May 6th. Now, I have that copy of May 6th but I don't have that copy.

Q. The next question I want to ask you, Mr. Anderson, then. [58] is, did you acknowledge the letter of April 30th inquiring for a proposal, did you acknowledge that letter?

A. On April 30th?

Q. No, April 26th, pardon me.

A. Yes, I did acknowledge that letter already.

Mr. Lycette: Will you produce your copy of the acknowledgment of that letter, the one which you sent to Col. Antonovich in reply to the letter of April 26th?

Mr. Peterson: You don't understand me. Our proposal, you have got it dated—the only proposal that I have got is the one of May 6th, and that is the one apparently that the Government accepted here.

Mr. Lycette: I am just asking if he will give me his response to Major Antonovich's letter of April 26th, which is Exhibit 3. That is what I want.

Mr. Peterson: Do you have anything—in my file, may I step down, Your Honor, and help?

I have my letters here, Counsel.

Q. Will you give it to me, please?

Showing you then what is marked Plaintiff's Exhibit 5 for identification, I will ask you if that is the letter which you wrote in response to the letter of April 26th?

(Testimony of Eivind Anderson.)

A. That is right, that is the letter.

Q. Now, did you get a response to that proposal to the Government? A. Yes, I did.

Mr. Lycette: Have you any objection to Exhibit 5?

Mr. Peterson: No, I will get it right here, we [59] have it. No objection to Exhibit 5, Your Honor.

The Court: It will be admitted, then.

(Whereupon letter referred to was received in evidence and marked Plaintiff's Exhibit No. 5.)

PLAINTIFF'S EXHIBIT No. 5

Phone Main 3521

Eivind Anderson

General Contractor

517 North I St., Tacoma, Washington

May 6, 1941

Major E. P. Antonovich

Constructing Quartermaster

Fort Lewis, Washington

Dear Sir:

I hereby propose to construct the boiler house and heating plant for the 400 Bed Hospital in accordance with Specification No. Fort Lewis-32, Pages ME-1 (sub) to ME-14 (sub), inclusive, and Plans Nos. 700-1517, Revisions A to E, inclusive; 700-1517.1, Revision A; 700-1518, Revisions A and B; 700-1519, Revisions A and B; 700-1520, Revision

(Testimony of Eivind Anderson.)

A; 700-1521, Revision A, and 700-243 Revisions A to E inclusive, for Boiler House, Type HBH-16, Modified, instead of Boiler House HBH-13 and Heating Plant shown on contract plans and specifications for the sum of Twenty-three thousand one hundred forty-two Dollars (\$23,142.00) additional to the amount of my proposal submitted April 8, 1941 for 400 Bed Hospital, 36 Miscellaneous Buildings and Utilities.

The following breakdown of the work is submitted for checking by your office:

ADDITIONAL LABOR AND MATERIALS REQUIRED

| | |
|--|-------------|
| Structural steel frame in place | \$ 5,800.00 |
| Corrugated iron siding and roofing | 280.00 |
| Continuous roof ventilators | 181.00 |
| Difference in boiler stack required | 1,148.00 |
| | <hr/> |
| | 7,409.00 |
| Plus 10% overhead | 740.90 |
| | <hr/> |
| | 8,149.90 |
| Revisions in mechanical equipment including foundations for boiler | 12,000.00 |
| | <hr/> |
| | 20,149.90 |
| Plus 10% profit | 2,014.90 |
| | <hr/> |
| | 22,164.80 |
| Concrete foundations and slab approximately 97.4 cu. yds. at unit price \$18.00 per cu. yd..... | 1,753.20 |
| Excavation approx. 260 cu. yds. at unit price \$0.40.... | 104.00 |
| Reinf. Steel approx. 1½ Tons at Unit Price of \$110.00 | 165.00 |
| | <hr/> |
| | 24,187.00 |
| Credit for wood framing of boiler house HBH-13..... | 1,055.00 |
| | <hr/> |
| Total..... | \$23,142.00 |

(Testimony of Eivind Anderson.)

This proposal covers all work and material necessary to insure a satisfactorily operating system that is complete in every respect and detail.

Yours very truly,

EIVIND ANDERSON

Eivind Anderson

[Endorsed]: Filed Apr. 6, 1944.

Mr. Peterson: And you want the Government's answer in response to that?

Mr. Lycette: Yes.

Mr. Peterson: Government's Serial letter on the same proposition of withdrawing those, letter in reply to that?

Mr. Lycette: I would like to have this letter marked Exhibit 6. I take it may be stipulated that this is the reply from the Government without asking the witness, Counsel?

Mr. Peterson: Well, you better ask him what it is. Show him.

Q. I will show you what is now marked Plaintiff's Exhibit 6, and ask you if that is the reply from the Government, letter dated May 14th?

A. Yes, I can recognize that as being the reply to that proposal I made on May 6th.

Q. Now——

Mr. Lycette: If Your Honor please, may I see the preceding letter, 4—5, I guess it is, yes, that is the one I wanted.

(Testimony of Eivind Anderson.)

I will offer 6 then in evidence, Your Honor, please.

The Court: It may be admitted in evidence.

(Letter referred to was then [60] received in evidence and marked Plaintiff's Exhibit No. 6.)

PLAINTIFF'S EXHIBIT No. 6

HHG:AM

War Department
Office of the Constructing Quartermaster
Fort Lewis
and Vicinity

Fort Lewis, Washington

May 14, 1941

400 Bed Hospital
Serial Letter No. 9

Mr. Eivind Anderson
517 North I Street
Tacoma, Washington

Dear Sir:

Subject: Confirmation of Acceptance of
Proposal

Reference is made to your letter dated May 6, 1941 with proposal in amount of \$23,142.00 for changes in Boiler House and Heating Plant for the 400 Bed Hospital at Fort Lewis, your Contract No. W 6105 qm-262.

This will confirm verbal acceptance of the proposal made on May 6, 1941, at which time you were

(Testimony of Eivind Anderson.)

authorized to proceed with the work in accordance with the revised drawings mentioned in your proposal.

It is understood and agreed that the changes covered by your proposal will not result in any extension of the completion date of your contract.

A change order covering the change will be prepared.

Yours very truly,

E. P. ANTONOVICH,

Lt. Col., Q.M.C.

Constructing Quartermaster

[Endorsed]: Filed Apr. 6, 1944.

Q. Now, before you submitted this proposal of May 6th for the revision of the boiler house and heating plant work, did you take up with Mr. Rushlight the matter of his doing the changed work and get a figure from him?

A. I recall Mr. Rushlight offered some figures on that—some suggestions on that, what the cost of that ought to be.

Q. And what figure did he give you for the additional cost of doing that work over the original specifications?

A. Well, I couldn't say that right offhand, I couldn't—I couldn't memorize exactly what those figures were.

(Testimony of Eivind Anderson.)

Q. Well, I find in your Exhibit 5, May 6th, revision in mechanical equipment including foundations, \$12,000.00, is that the figure which he gave you?

A. I don't think so, I don't recall. That is my figure.

Q. Did you have a figure from him at that time on the increased cost?

A. Yes, I think I had a figure from him and several other people.

Q. Now, you finally entered into a contract with Mr. Rushlight in writing under date of May 15th, 1941, did you not?

A. I believe that is the correct date.

Q. Can you produce a copy of that, your copy of that contract?

Mr. Peterson: Our contract with Mr. Anderson?

Mr. Lycette: With Mr. Rushlight.

Q. I will show you what is marked——

Mr. Peterson: If Your Honor please, if Mr. [61] Rushlight has a copy—has his original of our sub-contract, inasmuch as we are the general contractors and should have our files complete in case of any dealings with the Government, I would prefer that Mr. Rushlight use his copy of the sub-contract to our own. You may never have any other use for it and we have to sort of keep our files complete. I have no objection to its being used here, but just so——

Mr. Lycette: I do happen to have a copy of it here, but I wanted to have Mr. Anderson produce

(Testimony of Eivind Anderson.)

it. If you agree this is it, why I am perfectly willing to introduce it in evidence, now.

Mr. Peterson: With the right to substitute a copy.

Mr. Lycette: As far as I am concerned, you can substitute a copy for the original of what I just had marked as Plaintiff's Exhibit 7.

The Court: I think that would be the better course.

Mr. Peterson: All right, you are introducing our copy now?

Mr. Lycette: Yes, I am.

Q. I am showing you what is marked Plaintiff's Exhibit 7 for identification. It is dated May 15th, 1941.

A. That is the sub-contract, yes.

Q. Now, that sub-contract consists of a printed form to which there are attached several typewritten sheets? A. That is right.

Q. This printed form is one that you had, was it not, and which you used generally with your sub-contractors? [62]

A. Yes, sir, that is a form of sub-contract, printed form, that is, I believe, gotten up by the general associated—general contractors for such purpose.

Q. And the typewritten sheets which are attached to it were prepared by you, were they not?

A. No, I don't think—I don't believe so. I believe that was a—I believe that was an additional form that was supplied me by the bonding com-

(Testimony of Eivind Anderson.)

pany, that they suggested be attached to it in order to clarify various things in that printed form, I believe.

Q. In any event, that was your bonding company, was it not? A. Yes.

Q. Put it this way, it was not prepared by—these typewritten sheets were not prepared by Mr. Rushlight, but were handed by you to him with the printed form of sub-contract?

A. Used as an attachment to an exhibit to the printed form.

Q. I don't think you understand what I mean, they were not prepared by Mr. Rushlight, but came from you, either by making them up yourself or you got them somewhere else?

A. This entire thing was submitted to Mr. Rushlight for his acceptance.

Q. By you? A. By me.

Q. Now, Mr. Anderson, I would like—

Mr. Lycette: I would like to offer that in evidence now.

Mr. Peterson: No objection.

The Court: It will be admitted.

(Paper referred to was then received in evidence and marked Plaintiff's Exhibit No. 7.)

[63]

PLAINTIFF'S EXHIBIT No. 7

THE FORM OF SUBCONTRACT

This Agreement, made this 15th day of May, 1941, by and between A. G. Rushlight & Co., here-

(Testimony of Eivind Anderson.)

Plaintiff's Exhibit No. 7—(Continued)

inafter called the Subcontractor and Eivind Anderson hereinafter called the Contractor.

Witnesseth, That the Subcontractor and Contractor for the considerations hereinafter named agree as follows:

Section 1. The Subcontractor agrees to furnish all material and perform all work as described in Section 2 hereof for (name of project) 400-bed hospital and 36 misc. buildings, for (name of owner) War Department hereinafter called the Owner, at (Location of project) Fort Lewis and vicinity, Fort Lewis, Wash., in accordance with the General Conditions of the Contract between the Owner and the Contractor and in accordance with the Drawings and Specifications prepared by United States Government hereinafter called the Architect or engineer, all of which General Conditions, Drawings and Specifications signed by the parties thereto or identified by the Architect or engineer, form a part of a Contract between the Contractor and the Owner, dated May 6, 1941, and hereby become a part of this Contract.

Section 2. The Subcontractor and the Contractor agree that the materials to be furnished and work to be done by the Subcontractor are as follows:

Plumbing, heating, and mechanical installation work called for by bid form, addenda No. 1 to 5, incl., special condition and drawings, and as further covered by specifications sections:

(Testimony of Eivind Anderson.)

Plaintiff's Exhibit No. 7—(Continued)

P 1—P 21 incl.

ME 1—ME 15 incl.

H 1—H 17 incl.

TH-HV 1—TH-HV 17 incl.

HA 1—HA 7 incl.

Exhibit "A" is hereto attached and hereby made a part hereof and shall have the same force and effect as though inserted in the body of this agreement.

Unit prices as established by general contractor's proposal to the Government, April 8, 1941, shall be binding on the parties hereto.

Section 3. The Subcontractor agrees to complete the several portions and the whole of the work herein sublet by the time or times following: Work to commence as soon as the project is ready and to be carried on with sufficient force so as not to delay the general progress of the work. Should the said Subcontractor neglect to carry on his work with sufficient force and thereby cause delay on the project, the General Contractor reserves the right after giving 3 days ~~hours~~ written notice to take over the contract and complete the same, charging the expense thereof to the said Subcontractor; however, the Subcontractor agrees that in that event that no material, machinery or tools belonging to the Subcontractor shall be removed from the job until completion, or if the General Contractor deems it advisable to allow the Subcontractor to proceed, it is agreed that the General Contractor shall have the

(Testimony of Eivind Anderson.)

Plaintiff's Exhibit No. 7—(Continued)
right to charge the Subcontractor for any delay, expense or loss incurred in any such delay.

The sub-contractor understands that the general contractor is obligated to the owner to complete this contract by August 8, 1941. Time being the essence of this agreement, it is specifically agreed that if the sub-contractor by fault or negligence delay the completion of the general contract beyond the completion date, the sub-contractor shall be liable for liquidated damage in the amount as provided by the contract with the owner.

Section 4. The Contractor agrees to pay the Subcontractor for the performance of his work the sum of Two hundred ninety-three thousand dollars (\$293,000.00) in current funds, subject to additions and deductions for changes as may be agreed upon in writing and to make payments on account thereof in accordance with Section 5 hereof, but it is distinctly agreed by and between the parties hereto that no charge for extras shall be paid to the Subcontractor unless ordered in writing by the General Contractor, and it is agreed that this provision is a condition precedent to any such recovery.

Payment to be made as follows: 85 per cent of the work in place the last day of the month to be paid for on or before the 20th day of the following month, subject to the payments being received by the General Contractor from the Owner, and the balance to be paid within 30 days after completion and acceptance of the work by the.....and

(Testimony of Eivind Anderson.)

Plaintiff's Exhibit No. 7—(Continued)

Owner, subject also to payment to the General Contractor by the Owner. It is, however, understood that before each payment is made to the Subcontractor, satisfactory evidence must be shown the General Contractor that all bills for labor and material have been paid.

It is further understood that before each payment is made as above provided, receipts or releases for all material and labor as well as industrial insurance, medical aid and taxes have been paid.

It is further understood and agreed that all statements for which payment is requested by the Subcontractor shall be in the office of the General Contractor on or before the day of the month for work done the preceding month. It is agreed that payment to the Subcontractor shall be made each month in the amount as allowed by the Owner for material and labor performed up to the date of the engineer's estimate.

Section 5. The Contractor and Subcontractor agree to be bound by the terms of the Agreement, the General Conditions, Drawings, and Specifications as far as applicable to this Subcontract, and also by the following provisions:

The Subcontractor agrees—

(a) To be bound to the Contractor by the terms of this Agreement, General Conditions and Drawings and Specifications, and to assume toward him

(Testimony of Eivind Anderson.)

Plaintiff's Exhibit No. 7—(Continued)

all the obligations and responsibilities that he, by those documents, assumes toward the Owner.

(b) To make all claims for extras of every kind and nature in writing within one week from the date that said claimed extra is incurred. And if claim is made for extensions of time and for damages or delays, the Subcontractor shall make such claim in writing as provided in the General Conditions for like claims by the Contractor upon the Owner.

(c) All additions and deductions or extras required on the job shall be handled through the General Contractor.

The Contractor agrees—

(d) To be bound to the Subcontractor by all the obligations that the Owner assumes to the Contractor under the Agreement, General Conditions, Drawings and Specifications, and by all the provisions thereof affording remedies and redress to the Contractor from the Owner, except as otherwise provided herein.

(e) To pay the Subcontractor, upon the issuance of certificates, if issued under the schedule of values described in Article 24 of the General Conditions, the amount allowed to the Contractor on account of the Subcontractor's work to the extent of the Subcontractor's interest therein. This paragraph shall not in any way conflict with the provisions for payment under Section 4 of this contract.

(f) To pay the Subcontractor, upon the issuance

(Testimony of Eivind Anderson.)

Plaintiff's Exhibit No. 7—(Continued)

of certificates, if issued otherwise than as in (e) so that at all times his total payments shall be as large in proportion to the value of work done by him as the total amount certified to the Contractor is to the value of the work done by him.

(g) To pay the Subcontractor to such extent as may be provided by the Contract documents of the subcontract, if either provides for earlier or larger payments than the above. In the event that the Subcontractor is paid more than the amount specified above or advanced money on the contract, it shall not waive any rights or validate any part of this contract.

(h) To pay the Subcontractor a just share of any fire insurance money received by him, the Contractor, under Article 29 of the General Conditions.

(i) To give the Subcontractor an opportunity to be present and to submit evidence in any arbitration involving his rights between the General Contractor and the Owner.

Section 6. The said Subcontractor agrees to faithfully perform all the requirements of this contract, and to satisfy all claims and demands, including delay, for the same, and save harmless the Contractor from all costs and damage and claims of every kind and nature which the General Contractor may suffer in connection with the performance of this contract by the Subcontractor or the Subcontractor's failure to perform according to the terms hereof. In the event the Subcontractor

(Testimony of Eivind Anderson.)

Plaintiff's Exhibit No. 7—(Continued)

tor has received payments in part or in full as provided herein, he agrees to reimburse and repay the General Contractor for any loss or expense which the Contractor may suffer as a result of delay, faulty workmanship or any other loss due to the Subcontractor.

In Witness Whereof, the parties hereto have executed this agreement the day and year first above written.

A. G. RUSHLIGHT & CO.

By W. A. RUSHLIGHT, Pres.

Subcontractor

EIVIND ANDERSON

By EIVIND ANDERSON

General Contractor

Exhibit "A" of Sub Contract Agreement in Connection With 400-Bed Hospital and 36 Miscellaneous Buildings Project, Fort Lewis, Fort Lewis, Washington.

Paragraph 1. All of the following listed contract documents which form a part of the Specifications for the 400-Bed Hospital and 36 Miscellaneous Buildings project at Fort Lewis, including addenda 1 to 7 inclusive, all as prepared by the Constructing Quartermaster at Fort Lewis, are to become a part of the work covered by this agreement the same as though they were written herein, insofar as applicable to the work covered by this agreement and to the full extent to which they can

(Testimony of Eivind Anderson.)

Plaintiff's Exhibit No. 7—(Continued)

be interpreted to pertain to or affect the work covered by this agreement.

| | |
|------------------------|----------------------|
| Index | Performance Bond |
| Advertisement for Bids | General Scope of the |
| Bid Form | Work |
| Bid Bond | General Conditions |
| Instruction to Bidders | Schedule of Drawings |
| Contract | |

Paragraph 2. Whenever the word "contractor" or "general contractor" appears in any of the above-listed contract documents and requires the general contractor to perform any labor or services and furnish any materials, it is agreed that the sub-contractor shall perform any such labor or services and furnish such materials, but only insofar as same pertain to or affect the work covered by this agreement.

Paragraph 3. The sub-contractor agrees that he will, before any of the work covered by this agreement is commenced and in not more than five days from the date of this agreement, furnish the contractor with certificates of insurance showing that he has Workmen's Compensation, Public Liability and Property Damage Insurance in force covering his operations in connection with the work covered by this agreement, strictly in keeping with requirements of the contract.

Paragraph 4. The sub-contractor agrees that he will employ union workmen in good standing with the local union on all of the work to be performed

(Testimony of Eivind Anderson.)

Plaintiff's Exhibit No. 7—(Continued)

under this agreement at the building site, provided there are unions in existence from whom he can procure such workmen.

Paragraph 5. The sub-contractor will furnish the contractor within five (5) days from the date of this agreement a breakdown of the sub-contractor's contract price to establish basis of payment.

Paragraph 6. The sub-contractor further agrees that he will, if requested by the contractor, secure documentary evidence from all material houses to the effect that they have received payment in full from the subcontractor for all materials for which the sub-contractor is asking payment from the contractor together with a written release of any claims they might have against the contractor by reason of furnishing any labor or materials or the performance of any services in connection with this contract.

Paragraph 7. It is definitely understood and agreed that this sub-contractor will remove, not only from the building but from the project site, all refuse material and all rubbish and debris that may accumulate from time to time during the progress of the work covered by this agreement as often as required to keep the buildings clean to the satisfaction of the owners and the contractor; and if he fails to do so within two days after receiving notice, either verbal or written, then the contractor shall be privileged to remove such rubbish and debris at the expense of the subcontractor.

(Testimony of Eivind Anderson.)

Plaintiff's Exhibit No. 7—(Continued)

Paragraph 8. The sub-contractor agrees that immediately after being furnished with contract drawings and specifications by the contractor he will start work in connection with the preparing of all shop drawings, details, etc., as may be required for the approval of the architect or owner in connection with work covered by this agreement, and, further, that he will keep as large a crew of draftsmen engaged steadily on this regardless of the fact that materials, etc., which the drawings cover, may not be needed in the early stages of the work. He further agrees that he will take immediate steps to procure samples of all materials requiring approval by the architects or owner, and have these delivered to the contractor, properly labeled and ready for submission, together with a letter of transmittal, within not more than ten (10) calendar days from the date of this agreement.

Paragraph 9. In each case where the sub-contractor is installing materials as a part of the work covered by this agreement, it is definitely understood and agreed that he will accept full responsibility for any and all damages caused by his operations to plaster, painting, millwork, or, in fact, any items in the buildings that may be damaged and for which damage he is directly responsible.

Paragraph 10. In every case where a sub-contractor is required to furnish a surety bond guaranteeing the faithful performance and completion of

(Testimony of Eivind Anderson.)

Plaintiff's Exhibit No. 7—(Continued)

work covered by his subcontract agreement, then it is definitely understood and agreed that the contractor shall have the right to name the agent or broker through whom this business is to be placed. It is also understood and agreed that the surety company writing the bond for the sub-contractor will be one acceptable to the contractor, as surety, and further that the bond shall be in form and contents acceptable to the contractor.

Paragraph 11. It is understood and agreed that when and if additions to or deductions from work required in the base proposal and accepted alternates, if any, are ordered by the owner, then the sub-contractor agrees to cooperate by submitting figures covering extras or credits that are fair and reasonable, and figures that will be found acceptable to the owner. It is also understood and agreed that no extras or claims will be recognized by the contractor unless said extras or claims are also recognized by the owners.

Paragraph 12. The sub-contractor agrees to furnish a bond, such bond to be conditioned for the faithful performance of the contract and this exhibit in all particulars, and also to be conditioned for the payment by sub-contractor of all charges for labor, materials and any subcontracts into which he may enter. It is definitely understood and agreed that where a bond is required, sub-contractor shall furnish the same within five (5) days

(Testimony of Eivind Anderson.)

Plaintiff's Exhibit No. 7—(Continued)

from the date of this agreement, and should he fail to do so, the entire agreement shall become null and void. In such event, if sub-contractor desires to continue to attempt to get a satisfactory bond, he may do so at his own risk, but after the expiration of such five-day period, contractor will be free to negotiate with other sub-contractors for the work covered by this agreement and may award the work to any other sub-contractor. If, at any time after a five-day period, sub-contractor submits a bond, contractor will have the option of accepting or rejecting the same, and of accepting or rejecting this entire contract.

In every case where sub-contractor is required to furnish a bond, it is definitely understood that the sub-contractor is to pay the cost of bond premium thereon.

It is expressly understood and agreed that in no event is the requirement for a bond waived unless so stated in writing by having written across the face of the subcontract agreement the words: "Bond not required," and signed by the contractor.

Paragraph 13. The sub-contractor agrees that he will immediately make himself ready to commence work on unusually short notice from the contractor. He also agrees to accept instructions, both oral and written, from the contractor or his duly authorized representative as to when and how his work is to be commenced and carried on, and to this end he

(Testimony of Eivind Anderson.)

Plaintiff's Exhibit No. 7—(Continued)

agrees that he will commence and carry on his work strictly in keeping with instructions he will receive from time to time, with the definite understanding that he will not permit his work to delay progress of the contractor or any other sub-contractor on the work. He also agrees that he will complete the work covered by this agreement just as rapidly as the work of the contractor and other sub-contractors permits his doing so, even though it becomes necessary to work what might be termed as an unusually large crew of men on the work covered by this agreement.

Paragraph 14. This subcontract is not valid until the contractor notifies the sub-contractor in writing that the War Department of the United States Government has given the contractor its written approval of the subcontract.

[Endorsed]: Filed Apr. 6, 1944.

Q. Now, prior to the time that contract of May 15th was signed, did you have a proposal—written proposal submitted to you by Mr. Rushlight?

A. Yes, I did, I am sure I did.

Mr. Lycette: May I have that written proposal?

Q. Do you have it in your folder?

A. It is in counsel's file, I am sure.

Q. Showing you what is Plaintiff's Exhibit 8 for identification, I will ask you if that proposal—

(Testimony of Eivind Anderson.)

that is the proposal which Mr. Rushlight gave to you? A. Yes, on May 9th, 1941.

Mr. Lycette: I would like to offer that in evidence, Your Honor.

Mr. Peterson: No objection.

The Court: It will be admitted.

(Proposal referred to was then received in evidence and marked Plaintiff's Exhibit No. 8.)

PLAINTIFF'S EXHIBIT No. 8

| | |
|--|--|
| Fuels Oils—Domestic Burner Oils | Phone EAsT 9188 Rushlight Oil Burners For Domestic Service |
| Star Automatic Sprinklers For Fire Protection | Rushlight Oil Burners for Heavy Duty Service |
| Sheet Metal Specialtics For All Uses | Rushlight Air Conditioners For Home Heating |

A. G. Rushlight & Co.
407 S. E. Morrison St.,
Portland, Oregon
(Revised)*

~~April 3, 1941~~
May 9, 1941*

Mr. Eivind Anderson
517 N. Eye St.
Tacoma, Wn.

Dear Mr. Anderson:

We hereby propose to furnish the Plumbing, Steam Heating, and Hot Air Heating Systems, in strict accordance with Specification No.—Fort Lewis—32, and plans applying thereto, consisting

*[In longhand]

(Testimony of Eivind Anderson.)

of a 400 Bed Hospital Group and 36 Miscellaneous Buildings, for the sum of Two Hundred Ninety-Three Thousand 00/100 (293,000.00).*

The above proposal includes all work covered under the Plumbing section of the specification, Paragraphs P-1 to P-21 inclusive; all work under the Steam Heating part of the specification, mechanical equipment, boiler house and Steam Distribution, Paragraph ME 1 to ME 15 inclusive, Heating Steam Plant, H-1 to H-7a inclusive; Service Clubs and Dental Clinics, H-8 to H-17 inclusive: Theatres, TH-HV-1 to TH-HV-17 inclusive, and Hot Air Heating, Paragraphs HA-1 to HA-7 inclusive.

The following is our proposal for unit prices as called for in the Call for Bids.

Item No. 3

- A. Add the sum of \$2100.00
- B. Deduct the sum of \$1950.00
- C. Add the sum of \$253.00
- D. Deduct the sum of \$200.00
- E. Add the sum of \$750.00
- F. Deduct the sum of \$655.00
- G. Add the sum of \$1800.00
- H. Deduct the sum of \$1700.00
- I. Add the sum of \$1000.00
- J. Deduct the sum of \$850.00
- K. Add the sum of \$12,500.00
- L. Deduct the sum of \$10,500.00
- M. Add the sum of \$60.00

*[In longhand]

(Testimony of Eivind Anderson.)

- N. Deduct the sum of \$55.00
- O. Add the sum of \$1000.00
- P. Deduct the sum of \$900.00
- Q. Add the sum of \$7800.00
- R. Add the sum of \$5000.00
- S. Add the sum of \$10,000.00

Item No. 4, Unit Prices, Section B.

| | | |
|-----|---|------------------|
| 1. | 1 1/4" Steel pipe, Std. installed..... | .75 pr. lin. ft. |
| 2. | 1 1/2" " " " | .86 |
| 3. | 2" " " " | 1.00 |
| 4. | 2 1/4" " " " | 1.27 |
| 5. | 3" " " " | 1.45 |
| 6. | 1 1/4" Genuine Wrought Iron Pipe, installed | .83 |
| 7. | 1 1/2" " " " | .95 |
| 8. | 2" " " " | 1.13 |
| 9. | 2 1/2" " " " | 1.49 |
| 10. | 1 1/4" Std. Rising Stem Gate Valves, installed | 8.70 ea. |
| 11. | 1 1/2" Std. Rising Stem Gate Valves, installed | 9.40 |
| 12. | 2" St. Rising Stem Gate Valves, installed | 12.40 |
| 13. | 2 1/2" Std. Rising Stem Gate Valves, installed | 15.00 |
| 14. | 1 1/2" anchors, installed | 6.25 |
| 15. | 2" " " | 7.50 |
| 16. | 2 1/2" " " | 8.75 |
| 17. | 3" " " | 10.00 |
| 18. | 1 1/2" Expansion Joints, installed..... | 83.00 |
| 19. | 2" " " | 88.00 |
| 20. | 2 1/2" " " | 107.00 |
| 21. | 3" " " | 132.00 |

Yours very truly,

A. G. RUSHLIGHT & CO.

By W. A. RUSHLIGHT, Pres.

WAR:FP

[Endorsed]: Filed Apr. 6, 1944.

(Testimony of Eivind Anderson.)

Q. Now, Mr. Anderson, you will observe that Plaintiff's Exhibit 8, the letter which was just shown you, bears date at the top, April 3rd, 1941, in typewriter, and that was then cancelled and written in longhand under it, May 9th, 1941?

A. It was brought up to date, yes, at that date, and revised.

Q. Now, it is true, is it not, Mr. Anderson, that on April 3rd, 1941, Mr. Rushlight gave you this identical proposal bearing the typewritten date only. Then, the blank line for the amount filled in for the \$300,000.00?

A. That is absolutely not right.

Q. It is not true that you verbally accepted that at that time prior to the time your bid was submitted? [64]

A. I had no proposal and I had nothing to accept. It couldn't be anything to accept.

Q. Now this proposal dated May 9th, 1941, Exhibit 8, where was that given to you, do you know where you—where did you get it?

A. That which you just mentioned here, in this letter of May 9th?

Q. Yes, May 9th.

A. It was sent to me at my home.

Q. At your home? A. Yes.

Q. And who handed it to you?

A. Mr. Rushlight.

Q. And was any one with Mr. Rushlight at your home that evening?

(Testimony of Eivind Anderson.)

A. As I recall, his secretary was along, Mr. Hall, which we——

Q. Would you spell the name?

A. Hall—H-a-l-l, I think it is.

Q. Mr. Hall? A. Yes.

Q. That is—— A. H-a-l-l.

Q. That is the same man who was with you on the trip to Washington, D. C.?

A. Yes, he was on that trip, yes on that plane trip.

Q. And he is the secretary of the Rushlight Company, is he not?

A. That is the way he was introduced to me. I don't know anything more about him.

Q. You knew he was a lawyer, did you not? [65]

A. No, I did not.

Q. Well, on May 9th did you not know he was a lawyer?

A. He did not explain that he was a lawyer on May 9th, no.

Q. And do you mean on the trip that you and he were on to Washington, D. C., you did not know he was a lawyer?

A. I don't recall him explaining that he was a lawyer. I was introduced to him first on the airport in Spokane as Mr. Rushlight's secretary, and I had no reason to believe he was a lawyer or not a lawyer.

Q. How long were you with him in Washington, D. C.?

(Testimony of Eivind Anderson.)

A. Well, I saw him there several times. He had several other matters, I understand, he was attending to, and I saw him there for several days he was there, see?

Mr. Lycette: Now, has that last letter been introduced in evidence, Your Honor?

The Court: Yes.

Mr. Peterson: Exhibit 8, was it not?

The Court: Exhibit 8.

Q. After that proposal was given to you on May 9th, I will ask you if you did not give Mr. Rushlight a letter of May 10th, accepting that proposal, which is marked Exhibit 9?

Mr. Peterson: Did you hand that to Mr. Anderson?

Mr. Lycette: I am just having it marked. I will hand it to him (paper handed to witness).

A. Yes, I recognize that as my letter.

Q. Then, after writing this letter of May 10th telling him that you would make up a contract for him, you did prepare the contract dated May 15th and give to him for [66] signature?

A. Yes, I followed up on that letter by preparing a contract.

The Court: Are you offering that?

Mr. Lycette: Yes, I would like to offer it.

The Court: I am going to have to take an intermission and I won't pass on that because the jury is going to return. We may be able to proceed a little while longer.

(Testimony of Eivind Anderson.)

Mr. Lycette: I will offer Exhibit 9.

Mr. Peterson: No objection. That is 9, is it?

Mr. Lycette: That is 9.

(Whereupon letter was received in evidence and marked Plaintiff's Exhibit No. 9.)

PLAINTIFF'S EXHIBIT No. 9

Phone Main 3521

Eivind Anderson
General Contractor
517 North I St.

Tacoma, Washington
May 10, 1941

A. G. Rushlight & Co.
407 S. E. Morrison Street
Portland, Oregon

Att: Mr. A. G. Rushlight, Pres.

Dear Sir:

With reference to your proposal of May 9, 1941 for the installation of plumbing and heating system for the 400-bed hospital group and 36 Miscellaneous Buildings at Fort Lewis, Washington, you are advised that the amount of \$293,000.00 is acceptable. Formal contract is being prepared for your signature, subject to your furnishing satisfactory surety performance bond.

In order that the execution of my contract with the Government not be delayed, it is necessary that you advise me at once the name of the surety company from whom you intend to negotiate your bond.

(Testimony of Eivind Anderson.)

Please submit also the breakdown of your proposal for the individual parts of the work, such as Steam Heating, Hot Air Heating, and Plumbing.

Your prompt action in this matter will be appreciated.

Very truly yours,

EIVIND ANDERSON

Eivind Anderson

EA/b

[Endorsed]: Filed Apr. 6, 1944.

Q. Now, Mr. Anderson, I will ask you if you did not receive a letter from Mr. Rushlight under date of May 21, 1941, in connection with the change—this change in the power house that we have been discussing?

Mr. Lycette: Will you produce that letter?

Mr. Peterson: May what?

Mr. Lycette: May 21, 1941. I want that letter and letter of May 22nd, and letter of May 26th. Get them all out at once, if you will. Will you give me the letter of May 21st?

Mr. Peterson: Just a minute.

Q. I am now showing you Plaintiff's Exhibit 10 for identification which purports to be a letter dated May 21st from Rushlight to you. I will ask you if you received that letter, did you not, which was just produced from your counsel's files?

A. Yes, I received that letter. [67]

(Testimony of Eivind Anderson.)

Mr. Lycette: I would like to offer this letter in evidence, if Your Honor please.

Mr. Peterson: No objection.

The Court: It will be admitted in evidence.

(Letter referred to was then received in evidence and marked Plaintiff's Exhibit No. 10.)

PLAINTIFF'S EXHIBIT No. 10

[Letterhead]

A. G. Rushlight & Co.
407 S. E. Morrison St.,
Portland, Oregon

May 21, 1941

Eivind Anderson
517 N. Eye Street
Tacoma, Wn.

Dear Sir:

We understand that you have now received formal approval covering the change in Power Plant at the 400 Bed Hospital Project at Fort Lewis, Wn.

In as much as you have verbally instructed us to proceed with the ordering of the material for the Power Plant as revised, we would appreciate a change order from you covering the additional costs of this work and instructions to proceed with the construction of the Power Plant as revised.

Yours very truly,

A. G. RUSHLIGHT & CO.

By W. A. RUSHLIGHT

WAR:FP

[Endorsed]: Filed Apr. 6, 1944.

(Testimony of Eivind Anderson.)

Q. In that letter of May 21st, Mr. Rushlight wanted to know from you whether or not you had received a formal approval covering this change in the power plant at the hospital, and I will ask you if in response to his inquiry you did not send him Plaintiff's Exhibit 11, a letter dated May 22nd, telling him that it had been granted and that he was to go ahead under the changed plan?

A. Yes, I sent that letter I am sure.

Mr. Lycette: I would like to offer that in evidence, Your Honor please.

The Court: Any objection?

Mr. Peterson: No objection.

The Court: It will be admitted.

(Letter referred to was then received in evidence and marked Plaintiff's Exhibit No. 11.)

PLAINTIFF'S EXHIBIT No. 11

Rushlight, A. G.

May 22, 1941

A. G. Rushlight & Co.
407 S. E. Morrison Street
Portland, Oregon

Gentlemen:

In reply to your letter of May 21, you are advised that the Government has approved the change in the Power Plant of the 400-Bed Hospital Project at Fort Lewis in accordance with my proposal submitted May 2, 1941. This change involves revision in mechanical equipment, including the foundation and boilers.

(Testimony of Eivind Anderson.)

You are hereby instructed to make the necessary changes in the mechanical installation involved by the change in the Government plans and specifications as may be affected by your subcontract.

In accordance with our previous understanding, you are to furnish a breakdown statement showing the different items on the Plumbing, Steam Heat, and Hot Air Heat installation. Will you please forward this information immediately in order to permit me to furnish certain information required under my contract with the Government, giving also a separate breakdown on steam distribution. Your prompt attention to this matter is essential.

Very truly yours,

EIVIND ANDERSON

EA/b

[Endorsed]: Filed Apr. 6, 1944.

Q. And in your letter of May 22nd which was just introduced in evidence as Plaintiff's Exhibit 11 for identification, you requested Mr. Rushlight to give you a breakdown on the different items of plumbing, heating, and so forth. Now, I will show you Plaintiff's Exhibit 12 for identification and I will ask you if Mr. Rushlight did not furnish to you a breakdown in the form of that letter?

A. I think this letter here purported to be a breakdown, yes, from Mr. Rushlight. [68]

(Testimony of Eivind Anderson.)

Q. You received that letter just produced by your counsel, did you not?

A. This letter? I believe so.

Q. Well, is there any question in your mind about it?

A. I don't think there is.

Q. Now, did you make any—did you send any reply or any kind of a letter to Mr. Rushlight in response to his letter of May 26th?

A. The letter which you just—

Q. Yes, did you acknowledge that or send any reply?

A. I don't think there was any occasion to send any reply. I got what I wanted, or what I attempted to get.

Q. After reading the letter it is your recollection that there was no occasion for it—you did not send one, is that correct?

A. I may explain the purpose for getting such a breakdown was in accordance with the government's request to show to the government a breakdown on the various costs of the buildings for the purpose of making payment, and I think that answers that.

Mr. Lycette: I might desist now.

The Court: Recess this case now for twenty minutes.

(Recess.)

Mr. Lycette: I had just examined the witness about Plaintiff's Exhibit 12, which he stated he

(Testimony of Eivind Anderson.)

received and counsel looked at it, and I now would like to offer it in evidence.

The Court: Any objection? [69]

Mr. Peterson: No obligation, Your Honor.

The Court: It will be admitted.

(Letter referred to was then received in evidence and marked Plaintiff's Exhibit No. 12.)

PLAINTIFF'S EXHIBIT No. 12

[Letterhead]

A. G. Rushlight & Co.
407 S. E. Morrison St.,
Portland, Oregon

May 26, 1941

Mr. Eivind Anderson
517 N. Eye Street
Tacoma, Wn.

Fort Lewis 400 Bed Hospital
Fort Lewis, Wn.

Gentlemen:

The following is the breakdown on the Plumbing and Heating work for the Fort Lewis 400 Bed Hospital, Fort Lewis, Wn.

| | Plumbing | Heating | Total one Building | Total |
|---------------------|----------|----------|--------------------|-----------|
| 7 Barracks 63 Men | 1,329.00 | 632.00 | 1,961.00 | 13,727.00 |
| 1 Storehouse SA 2 | 335.00 | | | 335.00 |
| 9 Quarters Q 9 | 469.00 | 280.00 | 749.00 | 6,741.00 |
| 3 Post Exchange E 3 | 1,011.00 | 520.00 | 1,531.00 | 4,593.00 |
| 1 Recreation R B 1 | 160.00 | 570.00 | | 730.00 |
| 1 Theatre TH 3 | 955.00 | 11068.00 | | 12,023.00 |
| 6 Storehouse SH 13 | | | | |
| 1 Storehouse SH 18 | | 960.00 | | 960.00 |

(Testimony of Eivind Anderson.)

| | Plumbing | Heating | Total one Building | Total |
|---|----------|-----------|-----------------------|---------------------|
| 1 Administration A 3 | 1,089.00 | 1781.00 | | 2,870.00 |
| 3 Officers or Nurses Quarters HQ 24 | 1,167.00 | 2230.00 | 3,397.00 | 10,191.00 |
| 1 Hospital Quarters & Mess HQM 20 | 1,454.00 | 2470.00 | | 3,924.00 |
| 1 Hospital Quarters & Mess HQM 13 | 1,222.00 | 1573.00 | 2,795.00 | 2,795.00 |
| 4 Barracks Med. Det. HB 54 | 1,149.00 | 2528.00 | 3,677.00 | 14,708.00 |
| 1 Recreation Bldg. | | 780.00 | | 780.00 |
| 1 Mess Med. Det. M 6 | 735.00 | 1690.00 | 2,425.00 | 2,425.00 |
| 1 Clinic C 1 A | 2,769.00 | 2290.00 | | 5,059.00 |
| 1 Clinic C 3 B | 2,083.00 | 2325.00 | | 4,408.00 |
| 1 Dental Clinic DC 2 | 1,914.00 | 1,630.00 | | 3,544.00 |
| 9 Ward Std. W 1 | 1,381.00 | 2,697.69 | 4,078.69 | 36,708.21 |
| 4 Ward Combination W 2 | 2,274.00 | 2,604.70 | 4,878.70 | 19,514.80 |
| 1 Ward Detention W 8 | 2,092.00 | 2,353.00 | | 4,445.00 |
| 1 Mess EM Patients M 16 | 1,337.00 | 2,061.00 | | 3,398.00 |
| 1 Infirmary I 2 | 1,452.00 | 1,354.00 | | 2,806.00 |
| 1 Storehouse SH 6 | | 1,539.00 | | 1,539.00 |
| 2 Storehouse SH 7 | | | | |
| 1 Morgue MO 2 | 698.00 | 497.99 | | 1,195.99 |
| 1 Boiler House HBH 13 | 205.00 | 50,507.00 | | 50,712.00 |
| Open and enclosed walks | | 34,320.00 | | 34,320.00 |
| 2 Dental Clinics | 3,082.00 | 3,643.00 | 6,725.00 | 13,450.00 |
| 2 Guest Houses | 3,503.00 | 1,230.00 | 4,733.00 | 9,466.00 |
| 3 Service Clubs | 2,813.00 | 5,731.00 | 8,544.00 | 25,632.00 |
| Change order covering revisions in Power Plant as per our proposal dated April 30, 1941..... | | | | 12,118.47 |
| | | | | <u>\$305,118.47</u> |

(Testimony of Eivind Anderson.)

Total contract and changes to date.

Yours very truly,

A. G. RUSHLIGHT & CO.

By W. A. RUSHLIGHT, Pres.

WAR:FP

[Endorsed]: Filed Apr. 6, 1944.

Q. Now, Mr. Anderson, there was another letter of May 26th, to you, to which you replied under date of May 28, 1941.

Mr. Peterson: I have got that letter right here, and that will be one exhibit.

Mr. Lycette: Have you got a reply to that one?

Mr. Peterson: Yes, but I will take one at a time.

Mr. Evenson: Can you refer to the date and to whom and from whom, so we can follow what letter you have, Mr. Lycette?

Q. I will show you now Exhibit—Plaintiff's Exhibit 13, from Rushlight to you, dated May 26, 1941. I will ask you if you didn't receive that letter?

A. Yes, I received the letter.

Mr. Lycette: I offer it in evidence.

Mr. Peterson: No objection.

(Whereupon letter referred to was then received in evidence and marked Plaintiff's Exhibit No. 13.)

(Testimony of Eivind Anderson.)

PLAINTIFF'S EXHIBIT No. 13

[Letterhead]

Rushlight

A. G. Rushlight & Co.
407 S. E. Morrison St.,
Portland, Oregon

May 26, 1941

Mr. Eivind Anderson
517 N. 1 Street
Tacoma, Washington

Dear Sir:

Please send a letter in accordance with Paragraph 14, Exhibit A, of the sub-contract acknowledging in writing that the War Department of the United States government has given you its written approval of our sub-contract.

We notice in Exhibit A, Paragraph 1, that you refer to Addendas 1 to 7 inclusive, whereas, in the first page under section 2, you refer to addendas 1 to 5 inclusive. We were wondering if you were in error, as we have received only addendas 1 to 5, and we have never seen 6 and 7, if any. Please advise.

Very truly yours,

A. G. RUSHLIGHT & COM-
PANY

By W. A. RUSHLIGHT,
President

WAR:er

[Endorsed]: Filed Apr. 6, 1944.

(Testimony of Eivind Anderson.)

Q. Now, I will ask you if you didn't reply to that letter Exhibit 13, under date of May 28th, 1941, which reply has now been marked Exhibit 14?

A. That is my letter—a copy of my letter advising him of certain errors about addendas, should be 1 to 5 instead of 1 to 7, which is enclosed with the contract document.

Q. In the sub-contract which you entered into with Mr. Rushlight on the first page of it, it refers to the ad- [70] denda from 1 to 5 inclusive, but in Exhibit A it says Exhibits 1 to 7 inclusive. There wasn't any exhibits 6 and 7?

A. That was a typographical error. That is all the contract involves there.

Mr. Lycette: It should be Exhibits 1 to 5. I would like to offer Exhibit 14.

Mr. Peterson: I have no objection.

The Court: It will be admitted.

(Whereupon, document referred to was received in evidence and marked Plaintiff's Exhibit 14.)

PLAINTIFF'S EXHIBIT No. 14

May 28, 1941

A. G. Rushlight & Co.
407 S. E. Morrison Street
Portland, Oregon.

Dear Sir:

With reference to your letter of May 26, he advised that the reference made in Exhibit A of

(Testimony of Eivind Anderson.)

your contract to "addenda 1-7" is in error and should read "addenda 1-5."

This letter will further serve to inform you that the performance bond you have furnished in connection with the work provided for by your contract appears satisfactory and that the contract as entered into under date of May 15 is considered to be valid and binding in all respects. The War Department has been notified that you have been awarded the sub-contract as covered by your agreement and no further official approval is considered necessary.

Inasmuch as the work at this date has been considerably delayed, it is desired that you make all possible effort to make further progress. Your cooperation in this respect will be appreciated.

Very truly yours,

EIVIND ANDERSON

EA/b

[Endorsed]: Filed Apr. 6, 1944.

Q. Now, Mr. Anderson, I would like to have you tell me whether or not there are any additional specifications in addition to those which have already been introduced in evidence—that is a big bunch, I think that was Exhibit 2, was it—Exhibit 2, printed specifications.

A. Not that I recall. I was not supplied with any farther specifications under the government

(Testimony of Eivind Anderson.)

contract that had any bearing on my work with the government.

Q. Just to refresh your recollection, is it not true that there was issued to you an additional sheet of specifications relating to the mechanical equipment, which specifications are described "Substitute Specifications" in the letters of the government and in your own letters on this subject, and which specifications are these marked "M.E."?

A. No, they are not. That is a false conception of that I believe, Mr. Lycette.

Mr. Lycette: May I borrow those exhibits, Your Honor please, so I can call his attention to certain [71] things?

Q. I will ask you in Plaintiff's Exhibit 3 for identification, which is Major Antonovich's letter to you of April 26th, if the Major did not refer to the new set of specifications as "M.E.1 sub." and "M.E.14-B sub", meaning substituted specifications?

A. This letter here deals with that particular change in the heating plant that the government wanted to use instead of one that was specified by the regular specifications.

Q. All right, now, what does the word "sub" refer to?

A. Well, now, I don't really know offhand what he means there by this "sub". However the work that he called for to be performed is illustrated on certain drawings and this "M.E.sub" might have some bearing as to describing those particular boilers.

(Testimony of Eivind Anderson.)

Q. Now, don't you know as a matter of fact, Mr. Anderson, that there was actually issued a set of substitute specifications to cover the mechanical—

A. May I see those?

Mr. Peterson: Just a moment, Mr. Lycette. If Your Honor please, there is no other specifications that have any bearing, because our sub-contract with Mr. Rushlight concerning—deals only with the original M.E. as revised. Now that is what he is to perform. He is not to perform any other specifications whatever. Consequently whatever dealings there are between Anderson and the government on the subject would not be between Mr. Rushlight and Mr. Anderson. Your contract does not refer to any subs. [72]

Mr. Lycette: Of course it does not. That is the whole point of the matter. A man comes along after a later date after we give him a proposal to do the substituted specifications at an increased cost, and then because of the way the contract was carried along, the dating of it, then he says "Well, this \$12,000.00 additional cost was to be included in his original one", when his counsel pointed out the original form of contract does not mention the substituted specifications at all, but of course we performed under the substituted specifications and that was it, why the whole defense on it was just paper thin. There wasn't anything to it.

Mr. Peterson: That is what you got the revision on your contract for it.

Mr. Lycette: There is no revision on the sub-contract at all. It is limited to the original speci-

(Testimony of Eivind Anderson.)

cations and those only. That is why I had to go through and pick out all these papers to show what happened. They substituted specifications.

The Court: What is the question?

Mr. Lycette: I will go ahead with my question to cover the mechanical part of the contract as changed by the proposal which was initiated under date of April 26, 1941.

The Witness: Was that your last question, Mr. Lycette?

Q. Well, boiled down don't you know there was a set of mechanical specifications marked "M.E. sub" which were issued in connection with this job and which were the things referred to in Major Antonovich's letter and [73] referred to in your own letter—in your own letters every time you discussed this matter? A. If I know it?

Q. Just answer the question, don't you know that?

A. No, I did not know that there was any specification that had any other bearing except on the boilers. if there was any specification on them, they explain what kind of boilers they wanted and they bought the boilers and that was all there was to do, to change. Any other specification having a bearing on that job I would have to certainly analyze to see whether that would cover the work that we were doing on the four hundred bed hospital.

Q. Then let me ask you this, Mr. Anderson, to what did you think Major Antonovich was refer-

(Testimony of Eivind Anderson.)

ring in his proposal when he refers to Mechanical Sub specifications—M.E. sub?

A. I will say that it would refer to putting in two boilers of high pressure type instead of three boilers of a low pressure type. Now that of course was the explanation.

Q. All right, but what—

A. (Continuing) And that is also, as Mr. Lyette, put it, by those various drawings enumerated here which illustrate what this M.E. sub means. Now that is all the documents I have in the matter and that is all I thought was required under this revised proposal.

Q. Now I will show you your own letter of May 6, now, which you say is your proposal.

A. That is right.

Q. Now what did you mean when you said in that letter [74] that you would do the work called for in M. E. sub according to the revised plans? What did you mean by it?

A. Exactly what we had broken down there, as to the items.

Q. That is correct, but where did you find any specifications with which to figure out those costs?

A. We did not need any specifications.

Q. Well, didn't the government give you any kind of new plans and new specifications, saying what kind of new boilers they wanted?

A. They gave me new plans.

Q. New plans. Those are called revised plans, aren't they?

(Testimony of Eivind Anderson.)

A. I don't know until I examine them to know what the plans are.

Q. Now will you look in the letter of Major Antonovich and look in your own letter and see if you don't refer in both of them as the revised plans?

A. Yes, naturally the plans would be revised, that is true, because they took a different type of boiler house and all those items are specifically set forth in this proposal, so there would be no question about it, what those revisions were.

Q. They got out a new set of plans that covered this particular thing and called them revised plans number so-and-so, didn't they?

A. Yes, they took precedence over the old plans previously prepared.

Q. Didn't they also get out a new set of specifications and call them substitute specifications?

A. Well, that is what I say, I don't know whether they did or not. I don't think they did, to the best of my knowledge [75] and belief, and I still see no purpose for it.

Q. Now I will ask you if you in fact did not get what is marked Plaintiff's Exhibit 15, a revised specifications upon which Mr. Rushlight bid an additional twelve thousand dollars and give that very set that you have in your hand to Mr. Rushlight?

A. No, I have no recollection of receiving anything like this, or any communication of it. Now

(Testimony of Eivind Anderson.)

we will see—I don't see anything here in this specification that has any reference to a four hundred bed hospital or miscellaneous buildings, and I would assume that if the government prepared a substitute specification to take precedence over the one that we had supplied under the formal bid, that they would identify it to be for that job.

Q. All right then, specification——

A. I don't see any purpose of that specification.

Q. All right, specifically answering my question then, I understand you are telling me now that you never saw Plaintiff's Exhibit 15, this set of specifications, before? You can answer that "yes" or "no".

A. I wouldn't say I positively did not see it. There is a possibility that I might have seen it, there at Fort Lewis, inasmuch as I notice on the head there it calls for two boilers.

Q. Well now, I will ask you, didn't you give this identical copy to Mr. Rushlight so that he could give you the figures on the revised plans and the revised specifications on the boiler house?

A. Rushlight, according to his own explanation——

Q. Just a minute, you can answer that "yes" or "no". [76]

A. I did not. If he got a copy he got it from the government.

Q. Now did you ever obtain a copy yourself of this Exhibit 15 from the government, for yourself and have it in your files?

A. No, I don't think I did obtain one. I don't

(Testimony of Eivind Anderson.)

recall I did. In fact, I don't see any reason for obtaining it after all the information I had on the matter before I put in my bid.

Q. To the best of your recollection you can't tell now whether you ever saw this Exhibit 15 or a copy of it before right here in the court room?

A. It is possible that I saw it out there at Fort Lewis. It is possible. I wouldn't say I did or didn't.

Q. Well, are you able to produce any documents now which the government put out in the form of specifications or otherwise, which was the basis of your bid in response to Major Antonovich's letter of April 26th? A. Yes, I have got plans.

Q. You have plans? A. Yes.

Q. Outside of the revised plans, did you have?

A. Of the new work that they wanted—that they changed their original heating system setup.

Q. Outside of the plans did you have any? Is there any—do you have any other documents?

A. I had consultation.

Q. I said document.

A. No, I don't think so. I don't think so.

Q. Now would you give me the plans, the revised plans? [77]

The Witness: Would you excuse me?

The Court: Have you got them?

Mr. Peterson: I don't know what they are, Your Honor.

Mr. Lycette: These documents won't mean much

(Testimony of Eivind Anderson.)

to me or probably Your Honor until later, until we get some explanation.

Now I will have these plans which you have just handed me, Mr. Anderson, marked Plaintiff's Exhibit 16 for identification, and I will ask you if you are now stating that Plaintiff's Exhibit 16 are the revised plans for the power house on which you based your revised figure?

A. Yes.

Q. And I think they are dated—

A. April 29th.

Q. April 29th. Who gave these to you?

A. The Constructing Quartermaster.

Mr. Lycette: I will now offer these in evidence.

Mr. Peterson: Just a minute.

Q. Does the whole set—

A. The drawings that are referred to in this proposal is attached there.

Mr. Peterson: No objection.

The Court: It will be admitted.

(Plans referred to were then received in evidence and marked Plaintiff's Exhibit No. 16.)

Q. Now, did you have any—strike that. You obtained a change order, did you not, covering this change in the [78] boiler house—the government issued you a formal change order?

A. Yes, they instructed me before they give me the contract that my bid on that was satisfactory and that I could proceed and they would confirm this acceptance in writing, following.

(Testimony of Eivind Anderson.)

Q. Now the only acceptance that you had of that is the letter which I heretofore have shown you, I think the letter of May—

A. That was the letter of May 14th.

Q. Is that the only change order you got on it?

A. Well, that is the change order.

Q. That is the change order. Now, Mr. Anderson, the boilers which went into this work under the revised plans and specifications were actually purchased by you, were they not?

A. No, I believe they were purchased by Rushlight. He placed the order for them, I believe.

Q. You did what?

A. Mr. Rushlight placed the order for those boilers.

Q. Were they not purchased in your name from Roy Early?

A. I believe there was some arrangement between Mr. Rushlight and Roy Early for me to sign the contract because of the fact that Roy Early couldn't sell Rushlight in Portland. His agency for those boilers did not reach into Oregon and they made some arrangements there for me to sign this contract so that Rushlight could get those boilers right away.

Q. Would you produce me a copy of that contract, you have that in your file. [79]

A. With Roy Early?

Q. Yes.

Mr. Peterson: I have it here. I have the order also here.

(Testimony of Eivind Anderson.)

Mr. Lycette: Give me the two of them together and I will appreciate it.

Q. It was because you had signed that order that you——

Mr. Peterson: Just a moment, it is a little difficult for me to follow you, Counsel, if I have to dig out this.

Mr. Lycette: I am sorry, I was trying to speed it up a little.

May I enquire what the practice is on these exhibits which have been marked but not yet have been offered?

The Court: They remain in the custody of the Clerk.

Mr. Peterson: There is Mr. Rushlight's written orders. There is Mr. Early's order to us.

Mr. Lycette: I would like to have these marked. Mark them all as one, if that is satisfactory.

Mr. Peterson: Just a minute with those exhibits.

Mr. Lycette: I have not introduced them yet. I want to offer them with Mr. Rushlight.

Q. I ask you if your contract with the government was not cancelled by a written letter from Colonel Antono- [80] vich on or about December 15, 1941? [81]

A. I did get a letter from Colonel Antonovich on or about the 20th as I recall it, of December, about a month after we had finished the contract, that he considered to cancel it and I believe subsequent to that he had asked me to come back and

(Testimony of Eivind Anderson.)

do more work, so I don't know what the effect of that all has as far as cancellation goes.

Mr. Lycette: Will you produce that letter for me?

Mr. Peterson: What letter are you asking for?

Mr. Lycette: December 20th from Colonel Antonovich to Mr. Anderson cancelling the contract for failure to perform.

Mr. Peterson: Do you have the date of it?

Mr. Lycette: December 20th if I am not mistaken, [82] 1941. It is dated December 20th, a cancellation, one to his bonding company and one to him.

Please mark this Plaintiff's 18.

Q. I will now show you Plaintiff's Exhibit 18 for identification, a letter dated December 20th, 1941, from Colonel Antonovich to you and purporting or stating that the government hereby terminates your contract for failure to perform, and ask you if you did not receive that letter?

A. Yes, I received this. This is one of the letters, number 178, serial letter. [83]

WILLARD A. RUSHLIGHT,

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lycette:

Q. Please state your full name.

A. Willard A. Rushlight.

Q. And Mr. Rushlight, where do you live?

A. Portland, Oregon.

Q. And have you lived there all your life?

A. Yes.

Q. You are the president of the plaintiff A. G. Rushlight & Company? A. Yes, sir.

Q. A. G. Rushlight was your father, I take it?

A. Yes.

Q. How long have you been connected with the plumbing and heating business?

A. Well I have been in the plumbing and heating business since 1927. I worked as a journeyman at the trade before that time.

Q. How long did you work at the trade?

A. I was a journeyman, oh, about ten years, I guess, as near as I can remember.

Q. How long has A. G. Rushlight & Company been in business? A. Since 1927.

Q. Prior to that was the company carried on under a different name or a different form?

A. No, it was a new company, started in 1927 as a partner- [88] ship. It was incorporated in 1930.

(Testimony of Willard A. Rushlight.)

Q. Now will you just give us briefly, in a general way, some idea of the extent of the plumbing and heating business you have done in this general vicinity in the last three or four years?

A. Yes, I can. We done a quite extensive plumbing and heating business all over the Northwest, as well as in this area for the past number of years. You just want to limit it to the past three or four years?

Q. That would be sufficient.

A. You want me to name some of the jobs?

Q. Yes.

A. State Capitol Building, the last one built, was one of the jobs we done. The Motor Repair Base down at Fort Lewis.

Q. Indicate the amount of the contract.

A. The amount of the State Capitol was a hundred thousand dollars. The amount of the Motor Repair Base was over a hundred thousand dollars—I don't remember the exact figure on that one, and this four hundred bed hospital of course which we have this case over, and we done—that was approximately—the amount of that contract was possibly three hundred thousand—a little less than three hundred thousand. We done work for the Navy at Sand Point, and Bremerton Housing Authority the last couple of years aggregating in the total two million dollars. I wouldn't—

Q. You have done approximately two million dollars worth of work in the last two years?

A. Yes, in addition to what I have enumerated.

(Testimony of Willard A. Rushlight.)

Q. Now Mr. Rushlight, were you acquainted with Eivind Anderson [89] prior to April of 1941?

A. No.

Q. Did you meet him in connection with the call for bids on this four-hundred bed hospital at Fort Lewis? A. Yes, I did.

Q. I will ask you whether or not you made a proposal to him in connection with the plumbing and heating on that job, prior to the time that he bid—he gave his bid to the government?

A. Yes, I made him a definite proposal on the plumbing and heating prior to the time he made his bid to the government on this four-hundred bed hospital job.

Q. I will show you Plaintiff's Exhibit 8 which is a proposal and letter written to Eivind Anderson and bears the date of April 3, 1941, signed by you and apparently given to Mr. Anderson. I will ask you—strike that.

First call your attention to the fact that Exhibit 8, or that exhibit, has the original date cancelled out and then a new date May 9 written in. You observe that, do you? A. Yes, I do.

Q. I will ask you if that letter was first prepared on April—on or about the date that appears in typewriting?

Mr. Peterson: I object to that as being leading.

Q. What was the original prepared?

A. This was prepared April 3, 1941. This was the original proposal on this project, when it was originally bid by the general contractors.

(Testimony of Willard A. Rushlight.)

Q. And what—what proposal did you give to Mr. Anderson at [90] that time?

A. Well I give him a copy of this same proposal, with the exception that the amount was different. The amount was three hundred thousand instead of the amount of two hundred and ninety-three thousand, which is shown in this same proposal, which Mr. Anderson asked me to change the date on it to bring it up to the time that we agreed on this revised price, which was May the 9th.

Q. Now, was the letter that you gave to him on April 3rd a different, physically, or one of the exact copies that went through the machine at the same time?

A. It was exactly the same letter except it had a three hundred thousand dollar price on it instead of two hundred and ninety-three thousand dollar price.

Q. Was the three hundred thousand typed or written in?

A. I don't know, I believe it was written in, because we usually do in preparing a bid on a job of this kind we don't always have our prices finally determined until the last minute. We make up our formal proposal and fill in the blank, in order to save time, usually with pen and ink. I think it was done on the original proposal and this revised proposal.

Q. Now, Mr. Rushlight, after this was—the bid was submitted to him—your proposal submitted to

(Testimony of Willard A. Rushlight.)

him on April 3, 1941, was there any oral acceptance or rejection of it at that time?

A. Yes, it was orally accepted.

Q. I take it on condition that he got the job?

A. Yes, but he intimated to us he would give us the work on the sub-contract covered by this proposal. [91]

Q. After the bids were opened—strike that. Do you know where the bids were actually opened?

A. Yes, they were opened at Fort Lewis.

Q. And were you present when the bids were opened? A. Yes, sir.

Q. I will ask you—who was the low bidder then?

A. Eivind Anderson was the low bidder, Sound Construction Company was the second bidder.

Q. Now did you have any discussion with any government officers after the bids were opened about the contract being awarded to anyone? Don't say what it was, yet.

A. Yes, I did.

Q. Now with whom was it?

A. Mr. Grenault.

Q. Who was he?

A. Well he is the government architect—civilian architect in charge there.

Q. Now did you—I will ask you, after talking to him did you discuss what your conversation had been with him with Mr. Anderson?

A. Yes, I told—

Q. When was it, approximately?

A. The day the bid was opened.

(Testimony of Willard A. Rushlight.)

Q. What did you tell Mr. Anderson regarding that?

A. I told him that I had been informed—I did not tell him by who. However, I told him I had been informed that he would not be awarded this job because of his record in Washington, D. C.

Mr. Peterson: Just a minute, I object and move to strike that as being wholly irrelevant and im- [92] material. What has that got to do with this?

Mr. Lycette: It is a very definite part—

The Court: Motion will be denied, exception allowed.

Q. Then what did he say about it?

A. Well, Mr. Anderson scoffed at the idea. He acted as though he did not think I knew what I was talking about at that time; if he was the low bidder they would have to give him the job.

Q. All right. Now, did you hear from Mr. Anderson at any later date regarding this matter?

A. No, I left Mr. Anderson at that time and told him that if he found out that what I told him was authentic, inasmuch as he agreed to give us the job if he had got it if he had any trouble we would like to work with him.

Q. Did you hear from him?

A. Yes, I heard from Mr. Anderson later.

Q. When and where were you at the time?

A. I had left and went over to Moscow, Idaho. We were putting in a power plant at the University of Idaho, and Mr. Anderson called me on the 'phone

(Testimony of Willard A. Rushlight.)

there one night. It was not many days after the bid opening.

Q. Can you give us an approximate idea of the number of days that it was?

Q. Well, it was not very long. I would say some time within the week. I don't remember just the exact number of days, but it wasn't very long.

Q. All right, now, what—

A. Within a week.

Q. What was the substance of the conversation? [93]

A. Well he said that he had reliable information that the award had been recommended to—that the government had recommended the award of the contract be made to the Sound Construction Company, who was the second bidders and he wanted our help to get this contract, and he asked me if I would meet him in Spokane which I agreed to do, and also over the telephone agreed to have Mr. Hall meet us in Spokane in order to save time, because—

Q. Where was Mr. Hall?

A. Mr. Hall was in Portland.

Q. Just stop right there. Is Mr. Hall connected with the A. G. Rushlight & Company?

A. Well he is attorney for the company and he acts as secretary. He has one share of stock.

Q. Is he an honorary secretary?

A. Honorary secretary.

Q. He does not actually engage actively in the plumbing and heating business, does he?

A. No.

(Testimony of Willard A. Rushlight.)

Q. You say he is a practicing lawyer in Portland?
A. Yes, sir.

Q. Do you know approximately how long he has been practicing there?

A. Well, as long as I can remember, and that is quite a while.

Q. All right. Then did— what did Mr. Anderson say when you told him you would bring Mr. Hall—or who suggested Mr. Hall, do you remember?

A. Yes, I suggested Mr. Hall be asked to come into the picture to assist Mr. Anderson to get this job, because [94] it was apparent there would have to be a fight made in order to get this job awarded to Mr. Anderson on the basis of low bid.

Q. Then I just want to touch—I don't want to go into any great detail, but did you three meet in Spokane?
A. Yes, the three parties.

Q. Where did Mr. Anderson come from?

A. He came from Tacoma.

Q. How did he come to Spokane?

A. By airplane.

Q. Mr. Hall came from Portland. How did he come, do you know?

A. I think they both came by airplane, is my recollection.

Q. Did they come by the same plane?

A. Mr. Hall took the plane out of Portland and Mr. Anderson took the plane out of Seattle.

Q. There, did you three meet in Spokane?

A. We met at the airport and we had about

(Testimony of Willard A. Rushlight.)

fifteen minutes before the plane left for the east to talk the thing over.

Q. What was the purport of the conversation there?

A. Well the purport of the conversation——

Mr. Peterson: Just a moment, I still think that is immaterial so far as bearing on this sub-contract.

The Court: Objection will be overruled.

Q. You may go on. Make it as brief as you can.

A. The purpose of the conversation was that it was agreed that Mr. Hall would be employed to accompany Mr. Anderson back to Washington, D. C., and to assist him in de-[95] fending his rights in getting this contract, and it was also agreed there between Mr. Anderson and myself, in the presence of Mr. Hall that Mr. Anderson would give us this job, and still had not changed his mind, for three hundred thousand dollars if he was successful in getting the job, and on the basis of that understanding we agreed to share the expense of sending Mr. Hall east fifty-fifty.

Q. Do you know who paid Mr. Hall's expenses east?

A. Yes, Mr. Anderson paid for all his meals and hotel bills while he was in the east and I think I—as I recollect it, I bought his airplane ticket from Spokane east.

Q. Well then, did they—you did not go east with them?

A. No, I did not.

(Testimony of Willard A. Rushlight.)

Q. They—in due course they then came back, did they? A. Yes, sir.

Q. Now did Mr. Hall or Mr. Anderson report to you what progress they made?

A. I went east myself on other business shortly after that. I did not go to Washington, I went to New York and went to other cities in the east and I kept in touch with them by telephone as to the progress they were making, and then I met Mr. Hall just—in Washington. I came through Washington, D. C. the day that they had consumated the final deal on this project and he was ready to leave. Mr. Anderson already left, I think he left in the morning or the day before I got into Washington.

Q. Did you learn at that time it looked as though Mr. Anderson was going to get the contract, then?

[96]

A. Yes, that is right.

Q. Now, coming—before Mr. Anderson was actually awarded the contract did the matter of some change in the plans and specification develop?

A. Yes, it did.

Q. I will ask you if you saw, or it was shown to you, Major Antonovich's letter of May 26th—if you knew the substance of that and if so, from whom did you learn?

A. Yes, I have seen this letter before. I received a copy of it from Mr. Anderson.

Q. Now I will ask you whether or not Mr. Anderson took up with you the matter of submitting

(Testimony of Willard A. Rushlight.)

a proposal in response to Major Antonovich's letter?
A. Yes, he did.

Q. Now where was this—or did you have a meeting with Mr. Anderson in which that occurred?

A. Yes.

Q. Where did that occur?

A. Winthrop Hotel.

Q. In Tacoma? A. Yes.

Q. And at that meeting just state generally what occurred.

The Court: About when was it?

A. Well that would—I would have to kind of look at the record, Your Honor, to give you the date.

Q. Well, I will give you Plaintiff's Exhibit 4 for Identification.

A. Some time in the early part of May.

Q. Would that refresh your recollection?

A. Yes, this proposal is dated April the 30th. I guess that [97] would fix the date as of April 30th, and our proposal to Mr. Anderson is of that same date.

Q. Now does that—with that to refresh your mind, when was that meeting? Was it the date of the letter or some other date?

A. I believe we had a meeting prior to that letter, Mr. Lycette.

Q. How much previous?

A. Oh, maybe a matter of a couple of days, in which Mr. Anderson gave me these plans and specifications upon which to prepare figures. It may have been a little longer than that. If I could see

(Testimony of Willard A. Rushlight.)

the date of that letter again that Mr. Antonovich requested it.

Q. That is dated April 26th.

A. April 26th. Well then my recollection is pretty good, about four days from the 26th to the 30th.

Q. I will show you now Plaintiff's Exhibit 15 for Identification and I will ask you if you have seen that instrument before?

A. Yes, sir, I have.

Q. All right, and where did you see it, or where did you get it?

A. Well this was given to us by Mr. Anderson upon which to estimate the proposed change in the heating plant. This is a specification covering the changes which the government requested in their letter of April 26th.

Q. When was that given to you, do you recall?

A. Well it was probably given to us along with that request from Colonel Antonovich—I would judge about the same time, about April 26th, along with the plans. [98]

Q. Now were you given a copy or shown a copy of the revised plans which have been introduced in evidence in this case?

The Court: The blue prints?

Q. The blue prints? A. Yes.

Q. I don't know as you have to examine these. but were you given a copy of the revised plans from which to figure at that time? A. Yes, sir.

(Testimony of Willard A. Rushlight.)

Q. You don't know whether this particular copy which was given to me by Mr. Anderson in the court room was the same set or not? A. No.

Q. You were given those plans, Exhibit 16 and Plaintiff's Exhibit 15, is that correct?

A. Yes.

Q. And were given them by Mr. Anderson, is that correct? A. Yes.

Q. Now with those plans did you figure out what additional cost there would be for your part of the plumbing and heating? A. Yes.

Q. Did you do anything in connection with it, on what Mr. Anderson's additional cost would run?

A. Well, we worked—we worked up our cost on our part of it in accordance with those revised plans and specifications, and Mr. Anderson worked up his part and then we typed up that proposal there in my room in the Winthrop Hotel. [99]

Q. When you say that proposal, I will ask you if you are referring to Plaintiff's Exhibit 4 which is dated April 30th?

A. Yes, this is the proposal that we made in my hotel room.

Q. Now Plaintiff's Exhibit 4 consists of two letters, one—both dated April 30th. One of them, the lower purports to be signed by you. Will you look and see if that is signed by you?

A. Yes, sir, that is signed by me and that is my proposal for this work to Mr. Anderson.

Q. And the first sheet of that bearing the same

(Testimony of Willard A. Rushlight.)

date, purports to be signed by Mr. Anderson. Was that signed by Mr. Anderson?

A. Yes, that was signed by Mr. Anderson.

Q. I will ask you whether or not there was more than one copy of that made at the time?

A. Yes, that was made up in several copies, probably four or six copies. I don't recall now how many copies the government required, but they required several copies of each proposal.

Q. Now that particular copy you have there, Exhibit 4, that identical instrument, after the first page of it was signed by you what was done with it and how did you get it back here?

A. How did I get this copy?

Q. Yes, that is right.

A. Well I prepared several copies and Mr. Anderson signed them and I kept one copy for my file because we were both working on this together. I kept this for my record. This is my copy. That is all of the understanding we had [100] in submitting the revised figures on this power plant.

Q. At that time did you or Mr. Anderson know whether the government was going ahead with the revised power plant or not?

A. No, we did not.

Mr. Peterson: What date?

Mr. Lycette: April 30th.

A. (Continuing) When they asked us for a proposal we don't know whether they were going to accept it or not.

(Testimony of Willard A. Rushlight.)

Q. Did Mr. Anderson ever tell you whether or not he submitted that Exhibit 4 there, to the government?

A. Yes, he did. He told me that he had submitted it and he did submit it, and the government as I understand it, questioned the amount of it.

Q. Now when you say you understand, how did you get the understanding?

A. Well Mr. Anderson told me the government thought it was a little high and he talked to me about it and he subsequently re-hashed this proposal a little bit and submitted it a couple of days later—I don't know the exact number of days—very shortly, and I don't have a copy of that.

Q. Did he ever consult you regarding the resubmission of it?

A. No, our setup of it on our end of it remained the same, as far as I know.

Mr. Lycette: I would like to offer Plaintiff's Exhibit 4 into evidence.

The Court: Any objection?

Mr. Peterson: There is no objection, Your Honor. [101]

The Court: It will be admitted in evidence.

(Whereupon, document referred to was received in evidence and marked Plaintiff's Exhibit No. 4.)

(Testimony of Willard A. Rushlight.)

PLAINTIFF'S EXHIBIT No. 4

April 30, 1941.

Office of the Constructing Quartermaster,
Fort Lewis, Washington

Attention—E. P. Antonovich
Major, Q. M. Corps
Constructing Quartermaster

Dear Sir:

Reference is made to your letter of April 26, requesting supplementing proposal covering the omission of the heating plant and boiler house type HBH-13, and substituting therefor boiler house and heating plant type HBH-16 in accordance with drawings and specifications enumerated in your letter of April 26.

In this connection my proposal in the amount of \$25,402.38, and as an addition to my original proposal of April 8, 1941 is hereby respectfully submitted, and is based on the following data:

ADDITIONAL LABOR AND MATERIALS REQUIRED

| | |
|--|--------------------|
| 80 cu. yds. concrete in forms @ \$20.00 | \$ 1,600.00 |
| 260 cu. yds. excavation @ 50c yd. | 130.00 |
| 944 sq. ft. 6" concrete slab on earth filled @ 24c ft..... | 226.56 |
| Structural steel frame in place | 5,800.00 |
| Corrugated iron siding and roofing | 280.00 |
| Continuous roof ventilators | 181.00 |
| Difference in boiler stack required..... | 1,148.00 |
| 1½ tons reinforced steel @ \$100.00 | 150.00 |
| Concrete wind tunnels and boiler foundation..... | 1,500.00 |
| Revisions in mechanical equipment as per attached breakdown | 12,118.47 |
| Total Additions | <u>\$23,134.03</u> |

(Testimony of Willard A. Rushlight.)

| | |
|---|-------------|
| Deduction for wood framing of boiler house HBH-13 | 1,045.00 |
| | \$22,089.03 |
| Overhead and Profit 15% | 3,313.35 |
| | \$25,402.38 |
| Net Total | \$25,402.38 |

Very truly yours,

EIVIND ANDERSON

Eivind Anderson

A*R

A. G. Rushlight & Company
 407 S. E. Morrison Street
 Portland, Oregon

April 30, 1941

Mr. Eivind Anderson
 517 North Eye Street
 Tacoma, Washington

Proposed Changes in Power Plant
 400-Bed Hospital Group,
 Ft. Lewis, Washington

We propose to make the necessary revisions in the Power Plant for the 400-bed hospital group, located at Ft. Lewis, in accordance with revised drawings and specifications submitted by the Constructing Quartermaster, for the sum of \$12,118.47—this amount does not include concrete work for boiler foundations and air tunnels under boilers. For your information, we have estimated the concrete work required for boiler foundations and stoker installation to be approximately \$1800.00 for the two boilers. In accordance with the request

(Testimony of Willard A. Rushlight.)

of Mr. Drummond we are submitting below a detailed breakdown, showing in detail how the amount of our proposal has been derived at:

| | Original Estimate | Revised Estimate | |
|---|----------------------|---------------------|-------------|
| Boilers | \$15,830.00 | \$23,946.00 | |
| Soot Blowers | | 1,570.00 | |
| Stokers | 11,940.00 | 14,000.00 | |
| Tube Cleaners | | 180.00 | |
| Feed Water Regulators..... | 405.00 | 270.00 | |
| Boiler Feed Pumps..... | 1,180.00 | 1,230.00 | |
| Clock | 75.00 | 75.00 | |
| Feed Water Heater and Surge Tank | 2,800.00 | 2,800.00 | |
| Exhaust Head | 27.00 | 27.00 | |
| Back Pressure Valve | 161.00 | 161.00 | |
| Draft Gauges | 365.00 | 243.80 | |
| Stop and Check Valves..... | 342.00 | 360.00 | |
| Pressure Reducing Valve.... | 41.00 | 41.00 | |
| Fittings, Pipe, Hangers Valves and Traps | 3,600.00 | 3,600.00 | |
| Labor | 4,200.00 | 4,200.00 | |
| Liability Insurance: | | | |
| Social Security, Unem- ployment, etc. | 420.00 | 420.00 | |
| Pipe Covering | 2,800.00 | 1,200.00 | |
| Breeching | 1,200.00 | 1,600.00 | |
| | <hr/> | <hr/> | |
| | \$45,386.00 | \$55,923.80 | |
| Net Difference | | | \$10,537.80 |
| Plus 15% Overhead and Profit..... | | | 1,580.67 |
| | | | <hr/> |
| Amount of this Proposal..... | | | \$12,118.47 |
| | | | <hr/> |

Very truly yours,

A. G. RUSHLIGHT & COM-
PANY

By W. A. RUSHLIGHT, Pres.

[Endorsed]: Filed Apr. 6, 1944.

(Testimony of Willard A. Rushlight.)

Mr. Peterson: That is number four?

The Court: Yes.

Mr. Lycette: Does your waiver of the objection carry with it the authenticity of the signature of Eivind Anderson?

Mr. Peterson: No, I don't think—I don't think it is material.

Q. Now Mr. Rushlight—

Mr. Peterson: I don't think there is any question on that signature.

Mr. Lycette: You think it is his signature?

Mr. Peterson: I don't know.

Q. Now Mr. Rushlight, the actual performance of the work, was that done under Plaintiff's—the specifications which are now Plaintiff's Exhibit 15, the substituted mechanical specifications and these revised plans, Exhibit 16?

A. Yes, that is true, plus a shop drawing which we made and submitted for approval to the government. That is also a part of that complete revision. In other words, I think in there you will find it requires us to make a shop drawing of our proposed power plant layout. Those plans are only diagramatic. That is covered by the specifications.

Q. I will ask you if you can take just momentarily, take Plaintiff's Exhibit 16 and ask you if that is the plans and blue prints in this case, and I will ask you whether [102] you or any other heating and plumbing man could tell what kind of boilers and equipment were required by the plans alone, without the specifications?

(Testimony of Willard A. Rushlight.)

A. No. In that connection, Mr. Lycette, the only information given on this mechanical plans is the capacities. There is a great deal of information not specified that is covered in that specification. They do give some information here as to the capacities that the boilers are to be and pounds of steam per hour and the pumps and the feed water heater, but it is not a detailed specification, and it would be impossible to order from the notes on this plan, or to know what you are bidding on without those specifications.

Q. Now I note that these mechanical M.E. Sub runs from 1 to 14 inclusive. I will ask you, did these supersede the original—

A. Yes, sir, the actual construction was done on those substituted specifications, which were substituted for the originals.

Q. Now I will ask you, first, when did you receive formal notice from Anderson that the government had elected to go ahead with these substitute specifications?

A. Well, sometime the latter part of May, Mr. Lycette. I don't recall the exact date.

Q. I will show you this Plaintiff's Exhibit 10 which is a letter dated May 21st, and I will ask you if you wrote that letter to find out on that date whether those plans had—substituted plans had been accepted yet?

A. Yes, sir, this is the letter I wrote to Mr. Anderson and it has my signature on it. [103]

Mr. Peterson: What is that date?

(Testimony of Willard A. Rushlight.)

Mr. Lycette: May 21st.

Q. Did you know at that time whether or not they had actually been accepted?

A. No, sir, I did not. That was the reason for that letter, to find out.

Q. And did you receive back Plaintiff's Exhibit 11 from Mr. Anderson? A. Yes, sir.

Q. Is that the only written notification that you ever received from him that those plans had been accepted and to go ahead, or the first written notification?

A. Yes, I believe it is the written notification that we had that we were to go ahead and construct the job in accordance with the revisions.

Q. Now just jumping back a little bit, Mr. Anderson received a letter about May 7th or 8th—I think, which has been introduced in evidence here notifying him of the acceptance that the government had awarded the contract to him on his original bid of April 8th. Now I will ask you if, after he received that, did he contact you on or about that time? A. Yes he did, Mr. Lycette.

Q. Now the letter shows, which Mr. Anderson received, shows it was dated May 8th, 1941, and I will ask you with that in mind, did he about that time get in touch with you or you with him?

A. Was that the date of the notice to proceed?

Q. Yes, that was the date of the notice to proceed. A. Yes. Yes, he did. [104]

Q. Now, when you saw Mr. Anderson—or did you see him then? A. Yes.

(Testimony of Willard A. Rushlight.)

Q. Where did you see him?

A. I saw him at his home.

Q. Where is that? A. In Tacoma.

Q. Was there any one with you at that time?

A. Well I saw him twice, as I recollect, within a comparatively short period of time. The first time I saw him he wanted to renege on his agreement to pay three hundred thousand dollars for this job.

Q. When was that with reference to May 8th or May 9th, the date of your last proposal to him?

A. Well, let's see. Well, that was before the date of our last proposal. You mean the one for \$293,000.00?

Q. That is correct.

A. Yes, that was before that.

Q. Can you give us roughly in days, or whatever—

A. Oh, I would say it was three or four days prior to that, and so—

Q. Had he at that time—did he know at that time that he was going to get the contract?

A. Yes.

Mr. Peterson: Just a moment.

Q. Put it this way, did he tell you anything about it, and if so, what?

A. Well, yes, he told me he had the contract and he wanted us to do the job for \$14,000.00 less than the price we had agreed upon, which was—let's see, fourteen from [105] three hundred thousand is two hundred and eighty-six thousand.

(Testimony of Willard A. Rushlight.)

Q. Well, what happened?

A. Well we refused to go on that basis, and he showed me a proposal that he had gotten from another plumbing contractor where they had agreed to do the job for that price, or somewheres around there, so inasmuch as Mr. Hall had been back East with him and knew the understanding that we had in this whole matter, we had spent several hundred dollars to get this job with the understanding that we had, and paying Mr. Hall's expenses and other expenses in connection with the job, I told Mr. Hall that Mr. Anderson was now attempting to renege on his agreement that he had made and asked him to go to Tacoma with me and talk to Mr. Anderson, because I thought that him being there—the moral effect of him being there and having just gotten back from Washington a short time before with Mr. Anderson, might result in Mr. Anderson keeping his word.

Mr. Peterson: I object——

The Court: Yes, I think so.

Q. Tell us what you did, rather than what you thought.

A. I just explained how Mr. Hall happened to come to Tacoma and Mr. Hall and I met in Tacoma the date that proposal was dated.

Q. I will show you Defendant's Exhibit, the proposal dated May 9th, 1941 and I will ask you, was Mr. Hall with you on the date that proposal was dated and delivered? A. Yes.

(Testimony of Willard A. Rushlight.)

Q. And where did the delivery of that occur?

[106]

A. This was—occured at Mr. Anderson's home here in Tacoma.

Q. And now what happened at that meeting before this was signed so you reached a price of two hundred and ninety-three thousand instead of three hundred—

A. Well, that is a long story.

Q. Well give us just the ultimate facts.

A. Considerable comment and discussion about it and reviewed the whole situation, and Mr. Anderson was reminded by Mr. Hall and myself of his original agreement with me, and after considerable discussion, why this amount finally was agreed to as a compromise settlement of the price which is half—is half of the difference between what he wanted me to take it for and what our original agreement called for. You see, there is seven thousand dollars off.

The Court: In order that I might keep these rather complicated situations fairly clear in mind, did that include this revision and the extra costs that was incidental to it?

A. Your Honor, none of this discussion or conversation included that revision.

Mr. Peterson: What was the answer?

A. It did not include any of this revision on the power plant—any of this discussion or any of these prices, or proposals that I have been talking about here in the last few minutes.

(Testimony of Willard A. Rushlight.)

The Court: Though you contend you were advised of the revisions at that time?

A. Well, no, in the latter part of April. I [107] think that was previous to the time we made this quotation. We were working with Anderson preparing figures on this revision in the power plant, but we had no knowledge at that time that proposition was insisted on by the government.

Your Honor, at the time this was signed I wrote the word "revised". That was done because it was a revision price. In other words, it was a change of price from three hundred thousand to a price to two hundred and ninety-three thousand.

Q. Now did you know at the time Plaintiff's Exhibit 8 was signed that the revised plans for which you submitted an additional figure of twelve thousand one hundred dollars was going to be used?

A. No, I did not.

Q. Did you know that officially at any time before the letter of May 22, 1941 from Mr. Anderson to you, advising you that they had been accepted and were to go through?

A. No, I did not. I might say in that connection, Mr. Lycette,—it is not directly answering your question, but we did gamble a little on that.

Mr. Peterson: I move to strike that.

A. Well, all right, I was going to explain the situation.

Q. Now after this—is there anything in the letter of May 9th which was your proposal, the

(Testimony of Willard A. Rushlight.)

\$293,000.00, referring to revised plans or the mechanical substituted plans, M.E. Sub?

Mr. Peterson: Just a moment, the letter speaks for itself. [108]

Mr. Lycette: I think it does, that was merely for the assistance of the Court. Those terms are not used independently at all. That is the fact.

Q. Are the terms revised plans numbers or M.E. Sub used in the letter of May 9th?

A. No, they are not.

Q. Now in response to the letter—to that proposal of May 9th, did Mr. Anderson prepare and give to you his letter dated May 10th in which he accepts your proposal for two hundred and ninety-three thousand? A. Yes, sir.

Q. Now——

The Court: I think we will have to adjourn for today. It is 5:00 o'clock now. We will adjourn to meet at 10:00 o'clock tomorrow morning.

(Whereupon adjournment was taken until 10:00 o'clock A.M., April 7, 1944) [109]

April 7, 1944

10:00 o'clock a.m.

The court met pursuant to adjournment; all parties present.

WILLARD A. RUSHLIGHT,

resumed the stand and was examined further and testified as follows:

Direct Examination (resumed)

By Mr. Lycette:

Q. In the letter of Mr. Anderson to you of May 10th accepting your general proposal for \$293,000.00 he asked for a breakdown on the various items, and I will show you now Plaintiff's Exhibit 12, and I will ask you if that is the breakdown which you furnished to him? A. Yes, sir.

Q. I will call your attention to the fact that in this breakdown—in that breakdown there is at the last, after the items are all in separately on the various buildings, there is this statement: "Change order covering revisions in power plant as per our proposal dated April 30th, 1941, \$12,118.47." Did Mr. Anderson ever question that item after receiving this letter of May 26th on the breakdown that he requested?

A. No, that was never questioned.

Q. Now, Mr. Rushlight, was the sum of \$12,118.47 a reasonable price for the revisions in the power plant that you performed from the original contract? A. Yes, sir. [110]

(Testimony of Willard A. Rushlight.)

Mr. Peterson: Objected to, if Your Honor please, as wholly irrelevant and immaterial.

The Court: It will be overruled.

Q. Did you answer that?

A. Yes, I answered it "yes".

Q. Mr. Rushlight, did you submit during the progress of the construction bills or requests for estimates from month to month?

A. Yes, sir.

Q. I will ask you if on those *bill* whether you also included as part of the price as a separate item, this \$12,118.00? A. Yes, sir, we did.

Q. Did Mr. Anderson ever make any objection to it?

Mr. Peterson: Just a minute, the bills will speak for themselves if they rendered any bills.

The Court: You intend to offer—

Mr. Lycette: I do intend to offer—in fact, I am going to get them from Mr. Anderson's files. I am going to put him back.

Mr. Peterson: I move to strike that testimony as to what those bills might show.

The Court: I think I will let it in.

Q. Now Mr. Rushlight, I want to turn to a new subject,—strike that.

Was the work carried out on the power house finished and completed in accordance with the revised specifications—substituted specifications, Exhibit 15?

Mr. Peterson: Just a moment. Your Honor, please. I object to the form of that question. He

(Testimony of Willard A. Rushlight.)

can [111] show what he did, but what he did pursuant to—would be a matter—

The Court: Objection will be overruled, exception allowed.

A. Yes, sir, the work was installed in accordance with those revised substituted specifications.

Q. And now, will you state whether or not the work, referring to Plaintiff's Exhibit 4 which contains your proposal to Mr. Anderson to do this revised work according to the substituted specifications in the power house for \$12,118.47, did you do the work or was the work carried out in accordance with that proposal? A. Yes, sir.

Q. Was that proposal drawn in accordance with Plaintiff's Exhibit 15, the specifications?

A. You mean in accordance with those revised specifications?

Q. Yes. A. Yes, it was. [112]

The Court: And upon that issue you claim your contract did not require you to do that?

A. Your Honor, our contract in standard opinion requires us to do all the plumbing and heating, and hot air heating, but it does not call for us to do any wiring. Now there is a little ambiguity in these specifications, [128] in other words, as called to Your Honor's attention, electrical wiring is not mentioned in our specifications, but you have to bear in mind in these specifications they are talking to the general contractor. They don't recognize any subs. We did not contract with the general

(Testimony of Willard A. Rushlight.)

contractor to do any wiring, only the plumbing and heating. [129]

Q. First, did you contemplate doing the electrical wiring when you were bidding?

A. Yes, I got the question. Now we didn't contemplate doing the electrical wiring when we bid on the project, and the only time this question came up was when Mr. Anderson and myself were at the Winthrop Hotel discussing the matter of this power plant revision. At that time I called his attention to the ambiguity of the specifications—there was some ambiguity relative to this wiring, and contacted his electrician Mr. Holert on the 'phone at that time. This is the only time the discussion on the matter came up, to be sure that Mr. Holert had figured on doing the wiring for the steam distribution system, and included that in his bid, and he told us at that time over the telephone that he had. [130]

Q. Now then, Mr. Rushlight, we will get to the boiler house item, the twelve thousand dollars.

Mr. Rushlight, showing you Defendant's Exhibit 8, which is your proposal to Mr. Anderson under date of May 9, 1941, you had that before you—

A. Yes, sir.

Q. When you made that offer to Mr. Anderson. Will you state to the Court what boilers you intended to furnish under that offer?

A. We intended to furnish the boilers required under the original plans and specifications. Your Honor, when we made this offering. This offering

(Testimony of Willard A. Rushlight.)

is an exact copy of our proposal which we made to Mr. Anderson on April the 3rd, which was the original, and this additional copy was given to him only—really to take care of the reduction in price.

Q. That answers the question. That is, on May 9th? A. Yes, sir.

Q. And yet, Mr. Rushlight, is it not a fact, when you say at that time you intended to furnish the three boilers as required under the old specifications— [155]

A. I said that that proposal, Mr. Peterson, was based on furnishing the materials as called for in the plans and specifications,—

Q. Mr. Anderson—

Mr. Lyette: Just let him finish.

Q. Did you finish? A. I am through, yes.

Q. Mr. Anderson had never been awarded the contract from the government on the old boilers, had he?

A. Well, I think he had later. I don't think he had on that date. I don't know that.

Q. Was he ever awarded a contract from the government on the old boilers?

A. Well I believe so. If you have got a copy of the contract there, I believe it is all based on the old plans and specifications.

Q. Isn't it a fact, Mr. Rushlight, that three days before this, you and Mr. Anderson went to Fort Lewis, on May the 6th—that is three days before you made your proposal and didn't the government on that date approve—you had submitted

(Testimony of Willard A. Rushlight.)

your revised estimate and original estimate under date of April 30th, had you not?

A. Let me see it, I believe that is it.

Q. Showing you Plaintiff's Exhibit—what is that, four?

A. Yes, Plaintiff's Exhibit 4. Yes, this is our estimate on the revised work.

Q. You made that on April 30th?

A. Yes, sir.

Q. And you called it—in one column was the original figures and then the other one you called it the revised, and [156] the work was enumerated under both of them, was it not? A. Yes, sir.

Q. Then on April—on May the 6th, did you not go with Mr. Anderson to Fort Lewis and wasn't that revision approved by the government?

A. We were at Fort Lewis several times.

Q. No, just May 6th.

A. Well I couldn't say we were there on May 6th, because I don't remember. You have a letter—will you show me that letter that governs the date of the approval. I think that fixes the date. I don't remember these dates.

Mr. Peterson: That is fair enough, lets get that. Mr. Lycette, could you help me a minuate to find that letter from Fort Lewis, I think on May the 15th.

Mr. Evenson: It is Exhibit 6.

Q. All right, referring you to Plaintiff's Exhibit 6 from Antonovich, which confirms the acceptance of that—

(Testimony of Willard A. Rushlight.)

A. Yes, this letter is dated May the 14th and has reference to a verbal acceptance made on May the 6th.

Q. With directions to proceed with the work?

A. I don't know anything about that verbal acceptance on the part of Mr. Antonovich. I do know, however, at times Mr. Anderson and I were talking to the government about this; that they assured us that this change would be made.

Q. All right, just confine ourselves to May 6th. Were you present on May 6th?

A. Well that I couldn't—

Q. At Fort Lewis, when the revisions were accepted and the instructions to proceed was given as set forth in that [157] government exhibit or plaintiff's exhibit?

A. I couldn't say, Mr. Peterson, because I don't remember.

Q. Do you know whether you were present or not?

A. I was there several times. Whether I was on May 6th or not I couldn't testify to that.

Q. I will ask you whether or not Mr. Rushlight, you did not call on May the 6th, three days before you made your written proposal here, if you did not at that time call Mr. Wyatt, C. C. Wyatt of Early & Company, from Fort Lewis, over the 'phone—you know Mr. Wyatt, don't you?

A. Yes, sir, uh-huh.

Q. Did you not call him over the 'phone on May the 6th, 1941, and tell him that the government had

(Testimony of Willard A. Rushlight.)

approved the revisions and that you wanted to meet him in Tacoma and place the order for the revised boilers with him?

A. I don't recall that I do know that, as I recollect it, I think the contract there on the boilers would fix that date.

Q. All right, we will fix the date here. Showing you Government's Exhibit 17, is that in your handwriting? A. Yes, it is.

Q. And what date did you give that order to Mr. Early and Mr. Wyatt, and Mr. Early for those revised boilers?

A. Well I don't know the date, Mr. Peterson.

Q. All right, will you refer to the contract of Mr. Early?

A. This hasn't the date on it, this memorandum.

Q. All right, refer to the letter of Mr. Early that he wrote in connection with it, and ask you if you can identify it from that. There is two letters, one instructions for the contract and one for the placing of the [158] order the same date.

A. Yes, I believe that is a copy.

Q. You placed that with Mr. Early then on May the 6th, didn't you?

A. I don't know. This letter is dated May the 7th.

Q. Inclosing that order from you.

A. Mr. Anderson, as of that date—

Q. Then Mr. Rushlight, you knew on May the 6th or the 7th, three days before you made that

(Testimony of Willard A. Rushlight.)

proposal, that the revision had been accepted by the government and that the old boilers would not be used, didn't you?

A. No, I did not know that definitely. I could explain this whole situation if you will let me.

Q. You can explain later. And you placed your order with Mr. Early for the revised boilers there, did you not?

A. No, the order was placed by Mr. Anderson.

Q. Isn't that in your own handwriting, the order?

A. Yes, that was given to Mr. Anderson, not to Mr. Early, is my recollection.

Q. Will you read that? A. Yes.

Q. What does it say?

A. "You are hereby authorized to place order for two Erie City boilers complete with all trim and accessories as specified and as per your letter of April 29, 1941. Formal order will be signed by Eivind Anderson for our account for the sum of \$16,924.00. Boilers to be delivered and erected for above price".

Q. Signed by who?

A. A. G. Rushlight & Co., and myself as president. [159]

Q. And you wrote it out in handwriting in the Winthrop Hotel, did you not, on Wintrop Hotel stationery?

A. Yes, as I recollect it, if my recollection is correct, it was written out at Mr. Anderson's house.

(Testimony of Willard A. Rushlight.)

Q. I will ask you if that was not given to Mr. Wyatt in the Winthrop Hotel in Tacoma, Washington?

A. I don't recall. It might be so, Mr. Peterson, but I don't recall whether I gave it to him or not, but I wouldn't have any objection to your assuming that way, if that is the case.

The Court: It is time to adjourn now, and we will adjourn until 1:45 this afternoon.

(Recess.)

1:55 o'clock p.m.

Cross Examination (resumed)

By Mr. Peterson:

Q. I believe, Mr. Rushlight, as we adjourned you acknowledged having written Plaintiff's—or Plaintiff's Exhibit 17. That is this order for these two boilers.

A. Yes, that is right.

Q. That is correct, and they are what you would call the revised boilers?

A. Well, those are the substitute boilers.

Q. Well, substitute boilers.

A. That are called for under the substitute specifications.

Q. They are the ones that were furnished under the substitute specifications. Your revised estimates are one and the [160] same thing, so far as these boilers are concerned, are they not?

A. Well, that estimate is based on the substitute specifications.

Q. So it does not make any difference whether

(Testimony of Willard A. Rushlight.)

they furnished one or the other, these two boilers that you ordered from Early on May 6th or 7th were the ones that you required under your revisions of April 30th, are they not?

A. Yes, they are the boilers that would be required under the substitute specifications upon which that bid was prepared, you see—

Q. I understand, but this estimate, the one that was approved at Fort Lewis on May 6, was the very estimate of April 30th, was it not?

A. I don't believe so. I think from the record here—that—

Q. So far as the boilers are concerned.

A. Well so far as the boilers are concerned, I think they were the same. There were no changes in those substitute specifications carried on clear through. There was a different proposal made after that by Mr. Anderson.

Q. All right, we will get back to your letter then of May 26th, Government's Exhibit 12. Down in the corner you state—refer to that, and I think it says "change order covering revisions in power plant as per our proposal dated April 30th, 1941". Will you look at that, Mr. Rushlight, and ask you if that is your revision in Plaintiff's Exhibit 4. Is that the one you referred to in your letter?

A. That is right—that is true.

Q. So then this boiler you ordered from Early is the boiler [161] under your revisions?

A. They are the boilers called for in the sub-

(Testimony of Willard A. Rushlight.)

stitute specifications and also included in the revisions.

Q. And now then, those boilers that you ordered on the 6th of May were used in this project?

A. Yes, sir.

Q. And the work was—this revision work performed by you was in line with this proposal of yours of April 30, 1941?

A. Well I don't just understand your question.

Q. Well the figure you asked for in your complaint, for \$12,118.47, that appears to be the figure in your Government's Exhibit 4, of your letter of May 30th, so that is the work that you did, is it?

A. That is the work we did for which we are claiming the extra.

Q. And did you do any other work in addition to what you had in your revision of April 30th?

A. What do you mean, did we do any additional work?

Q. Did you do any additional work that you are claiming any additional claim from Mr. Anderson, except what you did under this revision work?

Mr. Lycette: You mean on the boiler house?

Mr. Peterson: On the boiler house.

A. No, that covers the entire work that was done on the substitute specification.

Q. And Mr. Rushlight, on May 9th when you came to Mr. Anderson with that proposal, you then intended, did you not, and had ordered the revision boilers, and that was the work to go in on

(Testimony of Willard A. Rushlight.)

May 9th, when you made this offer [162] to Mr. Anderson? A. Yes, I believe——

Q. Did you? Just answer that question.

A. The boilers were ordered as of—before that date.

Q. They were ordered that date and were those the boilers that you intended to put in when you made Mr. Anderson the revised offer on May the 9th? A. No, sir.

Q. Huh? A. No, sir, they were not.

Q. You had ordered boilers?

A. That is right.

Q. That you did not intend to put in?

A. I would have to explain that. That can't be answered by "yes" or "no".

Q. All right, you will have time to explain.

The Court: Let him explain, Mr. Peterson, now.

A. Your Honor, that proposal we made to Mr. Anderson on May 9th, that is when we cut our price from three hundred thousand to two ninety-three as testified to yesterday, that was based on the original plans and specifications, because Mr. Anderson did not have an order yet for this revised power plant, and he had not as yet given us an order for this revised power plant. However, we had been told by the constructing quartermaster's office that they wanted this power plant as provided by the substitute specifications and that in their minds it was sure to be accepted—they were going to accept it, but it had of course, to be approved by Washington. Now the reason these boilers were [163]

(Testimony of Willard A. Rushlight.)

ordered in that sequence was that these boilers were awfull hard to get. They are a high pressure type boiler, and at that time material of all kinds were difficult to get due to the preparedness program, so we agreed with Mr. Anderson that we would gamble on the government's accepting his proposal for the revised power plant under those substitute specifications and purchase these boilers in order to assure delivery of them in the ninety days time, and inasmuch as there was a considerable requirement for that type of boiler at the time, why, I agreed to let it go that way—to be ordered at that time, and took the responsibility that if we did not get this change order covering this revised power plant, why then I would dispose of the boilers elsewhere, because we were bidding on considerable other work of the same kind that required the same kind of boiler, and we put in during that period a lot of the same kind of boilers.

Now as I recall the situation at that time the boiler representative, Mr. Wyatt, representing the Erie City Boiler Company, told us they had these two boilers on hand and could make immediate shipment. They couldn't hold them unless they had an order, and we did not know—Mr. Anderson could not tell us when the government would accept this change, so we just gambled and bought the boilers in order to protect ourselves in the event the change order came through, which we were assured by the constructing quartermaster it would.

(Testimony of Willard A. Rushlight.)

so we could do the job in ninety days. If those boilers had been sold and we had to wait for boilers to be made, it would take more than ninety days to make the boilers. [164]

Now those boilers of course, were brought by Mr. Anderson and I agreed with Mr. Anderson that he could deduct the value of those boilers from our contract price if, of course, the change order came through from the government providing for the installation.

Q. They were ordered by you in writing, weren't they?

A. The contract was—the actual order was signed for the boilers by Mr. Anderson. That memorandum I have in writing there—

Q. Isn't that the order that you gave to Mr. Wyatt for those boilers in the first instance?

A. That is a memorandum and then Mr. Eivind Anderson—the record is clear there, bought the boilers under an understanding with me if this change was approved, to be deductible from the amount of our total contract for the changes.

Q. The report made in those letters by Mr. Wyatt is correct, is it not? A. What report?

Q. When he sends that order to Mr. Anderson and tells him that you had ordered them and that he was—Anderson was to sign the contract?

A. Yes, I think that is correct. That was the understanding that we had.

Q. Now then, Mr. Rushlight, on May 9th, did you have any other agreement with Mr. Anderson

(Testimony of Willard A. Rushlight.)

—any other written agreement covering the revision?

A. On May 9th did I have any other written agreement?

Q. Yes. He never agreed to pay you any price for the revision, did he? [165]

A. He did if he got the change order, yes.

Q. Well have you got any writing to that effect?

A. As of that date I haven't any writing of any effect from Mr. Anderson.

Q. All right, when you ordered those boilers you had no written order from Mr. Anderson for the revision, had you?

A. I hadn't anything in writing from Mr. Anderson for anything. I thought I had a contract with Mr. Anderson for three hundred thousand dollars.

Q. On May 9th when you made him this other proposal, did you make him any proposal for the revision?

A. His proposal for the revisions? If you will give it to me there, I will give you the date.

Q. I am talking about May 9th.

A. I want to check the date so I can answer you properly. I don't want to get confused on these dates.

Q. On May 9th, when you made the proposal for the two hundred and ninety-three thousand dollars did you at that time make Mr. Anderson any written proposal on it?

A. No, this is not what I want.

(Testimony of Willard A. Rushlight.)

Q. I am asking you the question.

A. Well I want the copy of it.

Q. I am talking about this date, on this date did you make Anderson any written proposal for the revision?

A. Well, if you will give me a copy of the written proposal I will see what date it has on it and then I can tell whether it is before or after this date. I can't keep these dates in my mind.

Yes, our proposal for these revisions was made [166] prior to the date of this letter. It is dated April the 30th, to Mr. Anderson.

Q. And did you renew them on May 9th?

A. No, sir.

Q. You did not.

A. Our proposal of May 9th---

Q. Did Mr. Anderson ever agree to pay you the \$12,000.00?

A. He never gave us a contract for that amount. I think the record will show that we have asked him to a number of times.

Q. You asked him to, but I am asking you, did Mr. Anderson ever agree to pay you \$12,000.00 for the revisions?

A. Yes, sir, orally he did.

Q. Orally he did? A. Yes, sir.

Q. Mr. Rushlight, showing you Defendant's Exhibit 3 which purports to be a letter from you to Mr. Anderson—two letters in fact, bearing date July 21st, 1941, I will ask you if you sent those letters to Mr. Anderson? A. Yes, sir.

(Testimony of Willard A. Rushlight.)

Q. And at that time you were asking him for—
to, in July, you were asking him to accept the price
on the revisions?

A. Yes, we were asking him to give us a written
order for them.

Q. And he never did so, did he?

A. He ignored it. He never declined or never
agreed to. He just simply ignored them.

The Court: It will be admitted in evidence.

(Whereupon letter referred to was received
in evidence and marked Defendant's Exhibit
No. A-3.) [167]

DEFENDANT'S EXHIBIT No. A-3

[Letterhead]

A. G. Rushlight & Co.
407 S. E. Morrison St.,
Portland, Oregon

July 2, 1941

Mr. Eivind Anderson
517 N. Eye Street
Tacoma, Wn.

Proposed Changes in Power Plant
400 Bed Hospital Group
Fort Lewis, Wn.

Dear Sir:

We propose to make the necessary revisions in
the Power Plant for the 400 Bed Hospital Group,
located at Fort Lewis, in accordance with revised
drawings and specifications submitted by the Con-
structing Quartermaster, for the sum of \$12,118.47

(Testimony of Willard A. Rushlight.)

—this amount does not include concrete work for boiler foundations and air tunnels under boilers. For your information, we have estimated the concrete work required for boiler foundations and stoker installation to be approximately \$1800.00 for the two boilers. In accordance with the request of Mr. Drummond we are submitting below a detailed breakdown, showing in detail how the amount of our proposal has been derived at:

| | Original Estimate | Revised Estimate |
|-----------------------------|----------------------|---------------------|
| Boilers | \$15,830.00 | \$23,946.00 |
| Soot Blowers | | 1,570.00 |
| Stokers | 11,940.00 | 14,000.00 |
| Tube Cleaners | | 180.00 |
| Feed Water Regulators..... | 405.00 | 270.00 |
| Boiler Feed Pumps | 1,180.00 | 1,230.00 |
| Clock | 75.00 | 75.00 |
| Feed Water Heater and | | |
| Surge Tank | 2,800.00 | 2,800.00 |
| Exhaust Head | 27.00 | 27.00 |
| Back Pressure Valve | 161.00 | 161.00 |
| Draft Gauges | 365.00 | 243.80 |
| Stop and Cheek Valves..... | 342.00 | 360.00 |
| Pressure Reducing Valve.... | 41.00 | 41.00 |
| Fittings, Pipe, Hangers | | |
| Valves and Traps..... | 3,600.00 | 3,600.00 |
| Labor | 4,200.00 | 4,200.00 |
| Liability Insurance: | | |
| Social Security, Unem- | | |
| ployment, etc. | 420.00 | 420.00 |
| Pipe Covering | 2,800.00 | 1,200.00 |
| Breeching | 1,200.00 | 1,600.00 |
| | \$45,386.00 | \$55,923.80 |

(Testimony of Willard A. Rushlight.)

| | |
|-----------------------------------|-------------|
| Net Difference | \$10,537.80 |
| Plus 15% overhead and profit..... | 1,580.67 |
| | <hr/> |
| Amount of this Proposal..... | \$12,118.47 |

Yours very truly,
 A. G. RUSHLIGHT & CO.
 By W. A. RUSHLIGHT, Pres.

WAR:FP

The amount of this proposal is hereby accepted and the amount of your sub-contract is hereby increased accordingly.

By

[Letterhead]
 A. G. Rushlight & Co.
 407 S. E. Morrison St.,
 Portland, Oregon

July 2, 1941

Mr. Eivind Anderson
 517 N. I Street
 Tacoma, Wn.

Fort Lewis 400 Bed Hospital Project and
 36 Miscellaneous Bldg.
 Fort Lewis Specification—32

Dear Mr. Anderson:

In checking our records we find we have nothing in our records showing your acceptance of the amount of the change in our sub-contract involving the changes in Power Plant. We are enclosing

(Testimony of Willard A. Rushlight.)

a new copy of our proposal, which please okay and return to us.

Yours very truly,

A. G. RUSHLIGHT & CO.

By W. A. RUSHLIGHT, Pres.

WAR:FP

[Endorsed]: Filed Apr. 7, 1944.

Q. Mr. Rushlight, showing you government's—
or plaintiff's exhibit—

Mr. Peterson: Let the record show if I ever use the word "government's" that it means the plaintiff's because it is brought in the name of the government.

Q. (Continuing): —Plaintiff's Exhibit 8.

A. Exhibit 8, yes, sir.

Q. And when did you prepare that?

A. This Plaintiff's Exhibit 8 is a copy of the proposed form which was made up by us on April 3, 1941, originally bidding the job.

Q. You say it is a copy. Is that the original or the copy?

A. Well, you know this is an original copy because, we can't get enough copies through a type-writer. There are several originals and several copies. This happens to be the top copy.

Q. You claim you retained the original and sent Mr. Anderson the copy?

A. I don't claim any such thing as that. I just

(Testimony of Willard A. Rushlight.)

simply answered your question this happens to be an original typewritten copy. I will tell you how it happened, you make twelve or fifteen copies of it.

Q. Do you claim you submitted a written bid to Mr. Anderson of it prior to that time?

A. Yes, he had a copy of this same proposal here as of April 3, 1941, calling for the three hundred thousand dollar price.

Q. And did you hand that to him or did you mail that to him?

A. Well I don't think I mailed it to him. I think I pro- [168] bably handed it to him, according to my recollection.

Q. That was about April 3rd?

A. April 3rd or thereabouts. It was prior to the time that he bid the job, himself.

Q. And he had not been—the bids had not been opened then, had they?

A. For the general contract, no.

Q. Did you make several bids to the various bidders on the main contract?

A. As a recall, there was just a very few of the general contractors we gave a bid to.

Q. How many bids did you give out?

A. I don't remember.

Q. To the other contractors?

A. I don't remember at this time how many contractors we bid at that time.

Q. Do you know how much price you quoted to the contractors?

(Testimony of Willard A. Rushlight.)

A. To the other contractors we bid with, we probably bid the same price.

Q. Do you know whether you did?

A. I don't recall without looking at the record. I don't know whether we have such a record left or not.

Q. Do you have any records of submitting any written bids to any other bidders on that Fort Lewis job?

A. I don't believe we kept any copies of the bids we put out to other contractors. I do know we submitted bids to other contractors. How many, I don't recall.

Q. You want it understood you submitted this bid to Mr. Anderson prior to the opening of the bids?

A. Yes. We met Mr. Anderson in Tacoma. I went over his [169] estimates with him in the Winthrop Hotel.

Q. Before the opening of the bids?

A. Yes, the best price he had was \$314,000.00 for this work and I agreed with him to do it for three hundred thousand. He told me at that time if he got the job it would be the \$300,000.00, based on the original plans and specifications.

Q. Have you any letters from him to that effect.?

A. No, sir, that was all oral.

Q. Bids oral too?

A. In the contracting business a man's word is usually worth a lot.

(Testimony of Willard A. Rushlight.)

Q. Were the bids oral?

A. My bid to him on a lot of it was oral, but I believe it was consummated by a copy of our bid sheet, because I had that along for that purpose. Mr. Anderson should have a copy of that in his possession.

Q. Oh, yes, you testified, Mr. Rushlight I believe, that Mr. Anderson sent you a letter requesting a breakdown. A. Yes.

Q. On your sub-contract. A. Yes.

Q. The sub-contract itself required you by special paragraph, didn't it, to furnish a breakdown on all matters within five days?

A. Yes, there was a provision in the specifications for the submission of a breakdown.

Q. So you were required to furnish that breakdown whether Anderson wrote you or not, were you not?

A. No, he has the contract. He has to request what he wants. [170] We knew that provision was there because that is common practice to furnish a breakdown to the government in making payment.

Q. I say that provision was in the sub-contract itself requiring you to furnish the breakdown?

A. I believe so. It is in the specifications, I know that, but I believe it is covered also in the contract. I could check the contract and see, if you hand it to me.

Q. Mr. Rushlight, on May 6th, prior to ordering of the boilers—revision boilers from Early, you

(Testimony of Willard A. Rushlight.)

and Mr. Anderson had discussed the contract price, had you not, for the entire job?

A. On May 6th we still had an oral contract, the contract price would be \$300,000.00 for the main job.

Q. I will ask you, Mr. Rushlight, whether on your way in from Fort Lewis on May 6th, if Mr. Anderson did not tell you that now that the contract has been accepted, we can talk price?

A. No, sir.

Q. And he stated to you—and wasn't it stated to you at that time that he had a bid of \$286,000.00; that if you wanted to handle the whole thing with the revisions, he would make it \$293,000.00, and you could accept it or reject it?

Mr. Lycette: Just a minute, Your Honor please, I am going to object to that on the ground that basically, this suit is upon a written form of sub-contract. I don't know whether Your Honor has had a chance to examine it with care or not, and I did not before make this point. The written form of sub-contract which was signed [171] on May 15, 1941 and was prepared by the defendant Mr. Anderson in this case, is specifically limited to the original plans and specifications, M 1 to M 15. Now those are not the pages, or the page numbers that are found that covers the item that counsel is now talking about. The ones that we are now specifically talking about are from M 1 to M 17. There were only 15 pages in the original M. E. specifications, and there are 17 in this, or it is vice

(Testimony of Willard A. Rushlight.)

versa, and are labelled "substitute", and there is not a word in this written sub-contract calling for Mr. Rushlight to do a thing in regard to any substituted specifications, nor is there any reference in any way to substituted specifications, or substituted or revised plans. It relates solely to the first contract that was issued—that is, the large specifications, Exhibit 2, and the contract was written and given to Mr. Anderson. Then these others are entirely separate.

Now I am objecting to this question that counsel asked as an attempt upon his part to enlarge by parole evidence the obligations of the sub-contract itself. Now if the testimony is offered for some other purpose, my objection will not be well taken, but I——

The Court: If I understand your position, Mr. Lycette, you are not relying entirely upon the original contract. You are relying insofar as these changes are concerned, upon a condition that was known to both parties considerably prior to the date of the execution of this contract.

Mr. Lycette: That is right, an entirely separate [172] thing.

The Court: And that involves of necessity some explanation for an apparent inconsistency between the execution of a contract upon a given date, subsequent to an understanding by both parties that the original plans be modified.

Mr. Lycette: Well, partly that. Our contention is that the May 15th contract itself covered only

(Testimony of Willard A. Rushlight.)

the original contract—the performance and the mechanical work under the original contract that Mr. Anderson had with the government, and the original specifications; that there was outstanding at that time and has been carried clear through, a separate proposal which covered a substituted section, and is clearly marked “substitute”, and ran right straight through. This is our contention.

Now that Mr. Anderson, if it was intended to—both in fact and legally, Mr. Anderson had intended on May 15th when he drew this contract to include the additional cost of these boilers that was to be brought about by the substituted plans, he would have used here not M. E. 1, to, or M. E. 1 to M. E. 15. He would have used M. E. 1 substituted to M. E. 15 substituted.

The Court: Of course that is an argument that may be made upon inferences that might be drawn, but it does not foreclose the materiality of testimony that might be explanatory of why this situation arose, and that is the question that counsel is now proposing or propounding to the witness here.

Mr. Lycette: I want my objection though, to show I am not letting this testimony go in without objection, [173] so far as it may be offered or attempted to be offered for the purpose of adding to or changing this written contract.

The Court: It will be so understood. Objection overruled and exception allowed.

Q. Mr. Rushlight, on your return from Fort Lewis and before you ordered these revised boilers,

(Testimony of Willard A. Rushlight.)

didn't Mr. Anderson tell you that he had a bid—a written bid from a Portland concern—I think that was Hasdorff, for \$286,000.00 and that if you wanted to do the work and take in the revisions that you could have it for \$293,000.00, and that you could either accept or reject it?

Mr. Lycette: May I have the same objection to that as the preceding question.

Q. Did he say it?

A. No, sir, he never did.

Mr. Lycette: Pardon, what was the answer?

The Court: He answered in the negative.

Q. Didn't you then tell Mr. Anderson that you would order the boilers and get under way at once?

A. No.

Q. You did not. I think you testified, Mr. Rushlight, that on Plaintiff's Exhibit 8 you wrote the word "revised" in there yourself at the top. That is in your handwriting, is it?

A. Yes, I wrote that at Mr. Anderson's request. I didn't know when he wanted that in he had a motive. I thought he wanted that to show a revised price.

Q. But you wrote that in, did you?

A. Yes, that is my writing. [174]

Q. You wrote it in on May 9th?

A. Yes, sir.

Q. And the two hundred and ninety-three thousand dollars, that is in your handwriting on this same government or Plaintiff's Exhibit 8?

A. Yes, sir.

(Testimony of Willard A. Rushlight.)

Q. And that was written in on the same date?

A. Yes.

Q. And A. G. Rushlight & Company, by Rushlight,—is that your signature there?

A. Yes, sir, that is my signature.

Q. As president? A. Yes, sir.

Q. On Plaintiff's Exhibit 8. Mr. Rushlight, I think you stated that Mr. Anderson had agreed to a three hundred thousand dollar proposal from you?

A. Yes, he originally gave us it—he agreed to give us the job on the basis of three hundred thousand dollars.

Q. He had? A. Yes, sir.

Q. And that was before any revisions?

A. The first time was before he even had the job. If he received the job it would be our job at that price.

Q. I think you stated that you met him at Spokane, and you were going to Washington, D.C.

A. No, I did not state that. I did state that I met him in Spokane, but not that I was going to Washington, D.C.

Q. You stated I think he called you at Moscow, Idaho? A. Yes, sir.

Q. Who called him, you or Mr. Anderson? [175]

A. Mr. Anderson called me.

Q. And do you know how Mr. Anderson learned you were at Moscow? A. No, I don't.

Q. Isn't it a fact, Mr. Rushlight, that you called Mr. Anderson, yourself, from Moscow and asked him what he was doing about his contract?

(Testimony of Willard A. Rushlight.)

A. I don't believe so.

Q. And that he called you back?

A. To the best of my recollection he called me at Moscow, Idaho. Now, if I had been talking to him prior to that I don't know.

Q. Didn't you leave a call to have him call you back at Moscow?

A. I don't know whether I did or not. I wouldn't say.

Q. Mr. Rushlight, in these negotiations at Fort Lewis you took the initiative, did you not, in getting all these revisions through and watching the definite progress of those contracts—those bids out there at Fort Lewis?

Mr. Lycette: Just a minute. I think that question should be limited as to some time.

Q. How many trips did you make to Fort Lewis prior to May 9 on this contract?

A. Oh, I haven't any idea, Mr. Peterson.

Q. You made several trips out there, didn't you?

A. Prior to May 9th?

Q. Yes.

A. I know I made a lot of trips, but I couldn't say it was prior to May 9th.

Q. Mr. Anderson did not ask you to make any bid, did he, [176] on this job?

A. On this job?

Q. Yes. Who initiated the bidding here to Mr. Anderson?

A. I don't quite get your point.

(Testimony of Willard A. Rushlight.)

Q. Did he call on you for bids, or did you volunteer the work in the first place?

A. Are you talking about the original bid before he received the job?

Q. Yes.

A. Well, I was introduced to Mr. Anderson by a representative of the surety company who asked me to give him a proposal on this job.

Q. Who did?

A. The representative of the surety company.

Q. And when was that?

A. Oh, that was prior to the opening of bids, the exact date I don't know.

Q. How long prior? The day of the opening of the bids, wasn't it?

A. It could have been. I don't know just exactly what date it was.

Q. And then isn't it a fact Mr. Rushlight, that you stayed right here and was keeping after Mr. Anderson all the time to do this and do that in connection with these revisions in the bids?

A. No, because I left right after the bids were opened at Fort Lewis and went over into Idaho, I know that.

Q. After you left Spokane—Mr. Anderson, when you left Spokane for Washington, D.C., you stated—

Mr. Lycette: Counsel, there is no testimony [177] he went to Washington, D. C.

Q. When Mr. Anderson came to Spokane and he was going to Washington, D.C. as I understand you he had, on your direct examination, that the

(Testimony of Willard A. Rushlight.)

understanding was that you were to have the contract at three hundred thousand dollars and that in consideration thereof, you sent Mr. Hall your attorney to Washington on the basis that you were to go fifty-fifty on the expenses—on his expenses?

A. Yes, that is right, Mr. Peterson.

Q. That was the proposition as—

A. That was the agreement Mr. Anderson and I had.

Q. And Mr. Hall and—was Mr. Hall present then?

A. Mr. Hall was present when that agreement was made, yes, sir.

Q. And you know that Mr. Hall now has brought suit for attorney's fees of five thousand dollars, independently, hasn't he?

A. Yes.

Q. For making that trip?

A. Yes, and he is having trouble getting his money, too.

Q. Nothing was said about attorney's fees at that time. You said there was supposed to be a contract at that time. Was there to be any attorney's fees on the deal?

A. There was a definite understanding between Mr. Anderson and myself concerning Mr. Hall, who was to pay him and how he was to be paid.

Q. And was that in addition to Mr. Anderson giving you the contract?

A. We were to have the contract for three hundred thousand dollars. That was the deal be-

(Testimony of Willard A. Rushlight.)
 tween Mr. Anderson and [178] myself. Then we further agreed that we would each share Mr. Hall's expenses fifty-fifty.

Q. And pay him five thousand dollars attorney's fees?

A. We agreed to pay him one percent of the contract.

Q. A million dollar contract? A. Uh-huh.

Q. So both of these considerations figured in going to Washington, did they?

A. What do you mean, both?

Q. It was not just because you were going to get the three hundred thousand dollar contract, but there was to be an attorney's fee in addition?

A. Not so far as we are concerned. We paid our part of it to Mr. Hall. We did that, of course, on the basis of course, because we thought we had a contract for three hundred thousand dollars.

Mr. Peterson: I think that is all, Mr. Rushlight, at this time.

Mr. Lycette: Just a moment.

Redirect Examination

By Mr. Lycette:

Q. Counsel has asked you about ordering these boilers from the Roy T. Early Company, either in your own name or having Mr. Anderson order them on May 6th or 7th. At that time—that is the date these letters bear—now were those letters in fact prior to the time you had to submit this proposal of May 9th to Mr. Anderson for your contract?

(Testimony of Willard A. Rushlight.)

A. I believe so, because all this transaction with Mr. [179] Anderson had all been oral up to that particular time.

Q. Well, did you have any written contract from Mr. Anderson, anything in writing from Mr. Anderson on May 6th or 7th, when these boilers were ordered, indicating that you were to have this contract at all?

A. No. All we had was his word for it, the oral agreement between the two of us for \$300,000.00 when we bought those boilers. We had no written contract at all.

Q. When they were bought on that day you were relying on what he told you prior to that?

A. I was relying on his integrity and his word.

Q. Now, Mr. Rushlight, will you look at Plaintiff's Exhibit 7—that is the actual written sub-contract, and will you tell us whether there is any place in that sub-contract, any mention of revised plans or of substituted plans?

A. No, sir, there is not. All of the provisions in this contract pertain to the original plans and specification, without change, as originally bid on.

Q. Now was it not after the execution of that contract that Mr. Anderson told you in writing that you were to go ahead on the substituted specifications?

A. Yes, sir, there is a letter there fixing that date, Mr. Lycette.

Q. I will ask you if Plaintiff's Exhibit 11, a letter dated May 22nd, which Mr. Anderson pro-

(Testimony of Willard A. Rushlight.)

duced here, if that is not your written instructions from Mr. Anderson that the revised plans had been accepted and that you would proceed on that basis?

A. Yes, that is true. [180]

Q. Mr. Rushlight, would you have signed the contract, Plaintiff's Exhibit 7, the sub-contract, showing the price—contract price of \$293,000.00 had Mr. Anderson included therein M. E. 1 to M. E. 15, sub?

A. No, we would not have, Mr. Lycette.

Mr. Peterson: Just a minute, objected to.

The Court: Overruled.

Mr. Lycette: I think that is all.

Mr. Peterson: Just one moment.

The Court: I have a question or two, Mr. Peterson, and then you can follow me.

Did you participate in any way in figuring the original bid Mr. Anderson made to the government?

A. No, I did not, Your Honor.

The Court: You did not know Mr. Anderson at that time?

A. I met him as a result of this bid call.

The Court: But the bid had already been made?

A. He had his figures all made up with the exception that he changed his plumbing figure after I made him the figure. He had—at that time the figures he showed me was three hundred and fourteen thousand, and he made a deal——

The Court: What I am trying to get at, did you and Mr. Anderson know each other and discuss the

(Testimony of Willard A. Rushlight.)

matter of his original bid to the government before it was finally submitted?

A. Well, only as pertains to the plumbing and heating.

The Court: Well, you knew each other before [181] then?

A. I never met Mr. Anderson prior to the time of this job.

The Court: No, but before he submitted his bid to the government?

A. Well, I never knew him prior to that time. I knew him, well you might say, two or three days before he actually submitted his on the job.

The Court: That is what I mean.

A. I met him a day or two prior to the time he submitted his bid, to give him our proposal on this work.

The Court: That is what I am trying to get at, if your proposal became a factor in his bid?

A. Yes, it did, Your Honor.

The Court: That was how long before he made his bid?

A. Just shortly before he put in his bid. I think it was the day before he put in his bid we agreed on this price, to the best of my recollection.

The Court: I assume, and if I am wrong in my assumption correct me,—you people, from what you have stated, I take this to be a fact, had other sub-contracts with principal contractors on government jobs, you would take a sub-contract on the plumbing end of it because that was your specialty?

(Testimony of Willard A. Rushlight.)

A. That is right.

The Court: And you kept in touch with the movement at the time where you knew the government was going to call for bids on a project, you interested yourself in and ascertaining the nature of the project [182] and how far it covered your particular field of operations?

A. That is right, Your Honor.

The Court: Then if the specifications were obtainable, why you got a copy of them and saw what sort of figures you might submit to whoever the successful bidder on the job was?

A. Yes, that is the mechanics, the way it works in our business.

The Court: And in this case did you ascertain who the bidders were or were going to be?

A. Yes, sir.

The Court: And conferred with them, other than Anderson, before they submitted their bids?

A. Yes, we did. There was quite a number of bidders. You see, the second bid on this project was the Sound Construction. We didn't give them a proposal on this particular project, but we had talked to others.

The Court: Then when it became evident after the bids were opened that some one in authority, locally, was going to recommend the Sound Construction Company who were not the low bidders, but for reasons of their own and we are not particularly interested in that, why of course your firm

(Testimony of Willard A. Rushlight.)

was left out of the possibility of the sub-contract on the plumbing?

A. That is right, if it had gone to Sound we wouldn't have taken the job. That was the reason why we were interested in working with Mr. Anderson, in order to secure this business, of course, on the plumbing and heating. [183]

The Court: Now up to that time I assume that no one knew that the government was going to change its mind concerning this power plant.

A. That is right, Your Honor, we didn't know anything about that at that time.

The Court: And up to the time that Mr. Hall went back to Washington, no one knew that there would be a change in the plans.

A. Not to my knowledge. I never knew it. I don't believe there had been any indication of it up to that time.

The Court: And up to that time, you had, of course, not submitted a formal written bid or had an acceptance of a formal written bid—that is, up to the time the trip was made to Washington.

A. To Mr. Anderson?

The Court: To Mr. Anderson.

A. My best recollection is that I gave him a copy of this proposal.

The Court: Is that copy in evidence?

A. No, there has been no copy of that produced in evidence, except the one on which the date is changed, the one that we prepared before the bids

(Testimony of Willard A. Rushlight.)

went in and we changed the date on it and changed the price on it—that is of May 9th.

The Court: That is when you were given consideration to what has been designated here the revised—

Mr. Lycette: May I call this to your attention and it may help you in asking the question to the witness here? That copy, that was produced by Mr. [184] Anderson from his files, and introduced here, and I wondered if I gave him that, that would show him the date and might refresh his—

The Court: It bears the typewritten date of April 3rd, and scratched out and written in longhand, I think you testified, in your writing May 9th.

A. That is right.

The Court: And May 9th is about the time you did execute the contract for the sub—covering your sub-contract on this, which would be subsequent to the time the government decided upon a revision.

A. Well Your Honor, what happened there, Mr. Anderson, after we gave him this, finally agreed on this price of two hundred and ninety-three thousand covering the original contract. On May 10th he wrote us a letter accepting this, telling us to go ahead, but he did not give us a formal signed contract until May the 15th.

The Court: That is dated first in typewriter on April the 3rd. Was it held by you from that time until May the 9th?

A. No, here is what happened. I wanted to explain, this date was prior to the date of the bid

(Testimony of Willard A. Rushlight.)

opening. This was prepared from which to make our bids to general contractors. We prepare those in blank and have the girls make a number of copies. In the general practice you don't know how many you are going to bid with or who, and contracting is a little bit of poker playing. You try to pick the right horse in working with the contractor in order to get the work, because your work has to be from the general contractor. So I [185] had a number of extra copies of these, so when we agreed on this revised figure with Mr. Anderson on May the 9th, why I used the same original form that we had submitted the original bid to him on of three hundred thousand dollars. Do you understand that?

The Court: No.

A. In other words, that was a form that was prepared just like the government prepares a form which the contractor bids on the job. We prepare that form for our use in bidding to the general contractor.

The Court: What I am trying to get clear is this, is a letter under date of April 3, 1941 before it was altered—

A. That is right.

The Court: And addressed to Mr. Anderson.

A. That is right.

The Court: Now was it ever mailed to Mr. Anderson, or a similar one ever mailed?

A. I don't believe any of those were mailed to Mr. Anderson. I may have handed it to him personally, myself.

(Testimony of Willard A. Rushlight.)

went in and we changed the date on it and changed the price on it—that is of May 9th.

The Court: That is when you were given consideration to what has been designated here the revised—

Mr. Lycette: May I call this to your attention and it may help you in asking the question to the witness here? That copy, that was produced by Mr. [184] Anderson from his files, and introduced here, and I wondered if I gave him that, that would show him the date and might refresh his—

The Court: It bears the typewritten date of April 3rd, and scratched out and written in longhand, I think you testified, in your writing May 9th.

A. That is right.

The Court: And May 9th is about the time you did execute the contract for the sub—covering your sub-contract on this, which would be subsequent to the time the government decided upon a revision.

A. Well Your Honor, what happened there, Mr. Anderson, after we gave him this, finally agreed on this price of two hundred and ninety-three thousand covering the original contract. On May 10th he wrote us a letter accepting this, telling us to go ahead, but he did not give us a formal signed contract until May the 15th.

The Court: That is dated first in typewriter on April the 3rd. Was it held by you from that time until May the 9th?

A. No, here is what happened. I wanted to explain, this date was prior to the date of the bid

(Testimony of Willard A. Rushlight.)

opening. This was prepared from which to make our bids to general contractors. We prepare those in blank and have the girls make a number of copies. In the general practice you don't know how many you are going to bid with or who, and contracting is a little bit of poker playing. You try to pick the right horse in working with the contractor in order to get the work, because your work has to be from the general contractor. So I [185] had a number of extra copies of these, so when we agreed on this revised figure with Mr. Anderson on May the 9th, why I used the same original form that we had submitted the original bid to him on of three hundred thousand dollars. Do you understand that?

The Court: No.

A. In other words, that was a form that was prepared just like the government prepares a form which the contractor bids on the job. We prepare that form for our use in bidding to the general contractor.

The Court: What I am trying to get clear is this, is a letter under date of April 3, 1941 before it was altered——

A. That is right.

The Court: And addressed to Mr. Anderson.

A. That is right.

The Court: Now was it ever mailed to Mr. Anderson, or a similar one ever mailed?

A. I don't believe any of those were mailed to Mr. Anderson. I may have handed it to him personally, myself.

(Testimony of Willard A. Rushlight.)

The Court: When was it handed to him personally, prior to the revised date it bears, May 9, 1941?

A. That was given to him on May the 9th, that particular copy, and he had a previous copy with three hundred thousand dollar price, prior to the date of the bidding, which would carry a date April the 3rd.

The Court: Well, that is not in evidence.

A. No, nobody has produced a copy of it. It is not in evidence. [186]

The Court: Do you have a copy of it?

A. No, we don't keep copies of those because they are not in contract form. They are just proposals. We have a master copy of—those are made off of, but we couldn't keep copies of each individual one.

The Court: Now when did the revision—what date did the revision first come to your attention?

A. On this power job, I believe the first date that that revision came to your attention was—fixed by a letter that the quartermaster wrote asking for this revision, Your Honor, and—

The Court: Yes, that is in evidence.

A. I would like to refer to that date because it is awful easy to get confused by these dates from memory. They all happened a long time ago.

The Court: That letter is in evidence.

Mr. Lycette: That letter is April 26th, from the quartermaster. That is correct, is it not?

The Court: And it was about that date that the matter came to your attention?

(Testimony of Willard A. Rushlight.)

A. Yes, that letter was written to Mr. Anderson, and I believe he called it to our attention shortly thereafter.

The Court: Well then did you go down with Mr. Anderson or some representative of your company and his company and figure what effect that would have upon your sub-contract as shown by the original government specifications?

A. Yes, Your Honor, I met Mr. Anderson up here in Tacoma and we worked up that revised proposition [187] which is in evidence, between the two of us of course, for submission to the Court by Mr. Anderson.

The Court: That is, that revisions, if the government requested, would result in increasing the bid price approximately twenty-three thousand dollars?

A. That is right, Your Honor.

The Court: And did it result in increasing the responsibility that you had under the orally agreed sub-contract?

A. Yes, it resulted in increasing our price which had only been orally agreed to up to that time, of \$12,118.00.

The Court: Well, in the final analysis from your theory if I understand it right, and your contention is that if the government is paying some twenty-three thousand dollars in addition to meet this revised power house program, and that entire sum went to Mr. Anderson, he would profit by just the

(Testimony of Willard A. Rushlight.)

amount that you contend that your sub-contract should be increased?

A. Yes, sir, that is right, Your Honor. In other words we are entitled to the amount of that proposal which bears relation to your increased work, which amounted to \$12,118.00.

The Court: There was no offset on this whole job that you know of that could be charged against this government increase?

A. No, sir, that was the flat increase, and that matter—that change in that power plant is carried along—the reason this thing is confusing, that matter was being carried along as a separate deal while this [188] original contract still had not been terminated by Mr. Anderson, you see, only orally and it did not come to a conclusion in written form until May the 15th.

The Court: That is between him and the government?

A. Between him and ourselves. You see he had—I believe he had a notice to proceed from the government prior to that time, but he did not reduce his agreement with ourselves in writing until May 15th into a formal contract, although I think the day after we gave him that lowered price of two hundred and ninety-three thousand dollars, he did the next day write us a letter accepting that price and telling us to go ahead, and it was not until May 15th he gave us a formal contract, and I never concerned myself about this change. This was a separate matter running along separately, which the

(Testimony of Willard A. Rushlight.)

government still had to act upon, and inasmuch as our proposal to Mr. Anderson did not cover this change or refer to it in any manner, and the contract that he submitted to us for signature did not refer to it in this substituted specification and plan, we never knew until this lawsuit started that he was going to attempt not to pay us that \$12,118.00.

The Court: But there was never a formal written contract in regard to that twelve thousand?

A. No, sir, the only thing in writing is in the record here, is where he authorizes upon our writing him a letter, to find out if we were to proceed with the change, he wrote us a letter and says "proceed with it", but not that he would give us so much for it. He [189] just says "go to work" and that letter is in the record.

The Court: I think that is all.

Mr. Lycette: In view of the Court's questions, I would like to ask the witness a couple of leading questions in chronological order.

Redirect Examination

By Mr. Lycette:

Q. Mr. Rushlight, the letter from Major Antonovich who was the constructing quartermaster there, to Mr. Anderson, was dated April 26, 1941. That is the letter which called for a substituted plans' proposal, is that correct?

A. Yes. I am not sure of the date, but you have the date before you.

Q. Well, I am looking at it as I go along. Now immediately after receiving that letter, I will ask

(Testimony of Willard A. Rushlight.)

you if you and Mr. Anderson did not get together to discuss what the cost of making that change would be? A. Yes, we did.

Q. I will ask you if you did not submit to Mr. Anderson on April 30,—that is four days later, a written proposal showing him the original cost that would come under the original plans and right alongside of that the cost that would come by reason of the changed plans? A. Yes, we did.

Q. And I will ask you if Mr. Anderson did not with you, on that same date, make up a letter to the government setting up the additional cost that he had to bear, and adopting your cost of \$12,118.00?

[190]

A. Yes.

Q. And attaching a copy of your letter and proposal directly to his proposal to the United States government? A. Yes, sir, that is right.

Q. And this letter—

Mr. Lycette: I would like to—I think Your Honor may not have caught the significance of it. That is Exhibit 4, dated April 30th.

Q. (Continuing): That letter of Mr. Anderson's shows your sum, the adopting of your sum of twelve thousand one hundred, by incorporating your letter right to it, does it not? A. Yes, sir.

Q. That is the letter signed by Mr. Anderson?

A. Yes, sir.

Q. And attached to it is a copy of your own which you gave to Mr. Anderson, that is correct?

A. Yes, sir.

(Testimony of Willard A. Rushlight.)

Mr. Lycette: Your Honor will notice in that one of Mr. Anderson he gives a number of breakdowns of his own, and then there is one lump sum that he uses of Mr. Rushlight's, as per letter attached.

Q. Then following that on May 9th, you gave him this proposal which related only to the original specifications, did you not? A. Yes, sir.

Mr. Peterson: Just a moment, I move to strike, Your Honor. It is a repetition of that—

Mr. Lycette: It speaks for itself.

Q. On May 10th Mr. Anderson accepted your letter of May 9th, [191] did he not, by Plaintiffs' Exhibit 9?

A. Yes, that is right, Mr. Lycette.

Q. Now, was there anything in the letter of— Mr. Anderson's letter of acceptance dated May 10th referring to any revised plans or substituted plans, or revised or changed specifications?

A. No, sir. I read this letter yesterday. There is nothing in there referring to the revisions. That was an entirely separate matter.

Q. Then, your contract then followed on May 15th, your actual sub-contract? A. Yes, sir.

Q. Then, just to get it straight now, it was following that a few days later that Mr. Anderson gave you a written letter telling you—I am trying to find it, just a second, I think I may have handed it up there, I think the one of May 22nd.

The Court: No, I have not got it here.

Q. Yes, on May 21st you asked Mr.—by Exhibit

(Testimony of Willard A. Rushlight.)

10, you asked Mr. Anderson if he had received his formal approval of the revised power plant with the substituted provisions, did you not?

A. Yes, sir.

Q. Then on the 22nd he sent you Exhibit 11 which tells you he has the formal approval of that power plant and that you were to proceed under the revised plans so far as the power plant is concerned. That is correct, is it not?

A. Yes, sir.

Q. Then following that he requested you to give him a break- [192] down of your costs on your plumbing and heating, is that correct?

A. Yes, sir.

Q. And on May 26th, that is four days after he told you to do that, you furnished to him Plaintiff's Exhibit 12 which he produced here, which gave the breakdown and contained all your figures, and ended up "and change order covering the revisions in power plant as per our proposal dated April 30, 1941?"

A. Yes, sir.

Q. And I think you testified, and he did, both, that he never objected or protested or mentioned that sum after that?

A. That is right, he never protested that.

The Court: I think that is right.

Mr. Lycette: There is just one question. I think Your Honor had it straight, but in asking the witness you may have misunderstood. I will try and straighten it out.

(Testimony of Willard A. Rushlight.)

Q. Is it not the practice, Mr. Rushlight, not only in the plumbing and heating but in all general contracts where the government or anyone else invites a bid from a general contractor that the sub-contractors furnish a proposal to the bidders before they ever bid, so that they can use it, like the heating and plumbing trade or electrical trade, so they can use that figure in making up their general estimate?

Mr. Peterson: I object to that, if Your Honor please. Each contractor can use his own method in making up estimates. He may get one contractor—— [193]

The Court: I do not think that is so material.

Mr. Lycette: I wanted to show it came before the bids were opened.

The Court: He stated that in answer to the Court's direct questions.

Mr. Lycette: That is all.

Recross Examination

By Mr. Peterson:

Q. Mr. Rushlight, you have referred to these sub M. E's as though it should be a part of the proposal or of Mr. Anderson's acceptance of the contract. Your revisions—your boiler revisions does not cover everything in the sub M. E's specifications, does it? They are not one and the same thing, are they?

A. I think you are wrong, Mr. Peterson. I did not state that this sub-specification should be covered in the original proposal. The original con-

(Testimony of Willard A. Rushlight.)

tract and proposal is right the way it stands. It was an attempt between Mr. Anderson and I at the time——

Q. You say that you did your work under these sub M. E's, and the sub M. E's should be substituted for the M. E. in your sub-contract. Is that the contention I understand?

A. That is right.

Q. All right.

A. Those sub-specifications are the ones on which we built the changed power plant.

Q. That does not mean that you were to do all the work that is set forth in the sub M. E's does it? [194]

A. Yes, sir.

Q. All right, will you refer to Section M. E. 13? The contractor was to put in the foundations for the boiler house. Were you required to do that by your revisions?

A. Yes, with the exception that we, in our proposal to Mr. Anderson, we excepted that. That is a matter of record here in the court room.

Q. Let's find out whether they are.

A. In other words, we have no facilities for pouring concrete, and Mr. Anderson agreed with me to do that part of the work.

Q. In other words, when they came to making up these revisions, they had gone to Fort Lewis and from these M. E. subs or from the drawings that the government furnished—whatever they did, they agreed on the exact specific items set forth in this letter of May—of April 30th.

(Testimony of Willard A. Rushlight.)

Mr. Lycette: I want to object to that question as too indefinite.

Q. At the Fort Lewis, the government agreed exactly to the situation as it was submitted on April 30th, did they not?

A. Well, I don't know how to answer that.

Q. All right, there is your estimate there, the Government's Exhibit 4.

Mr. Lycette: I don't think the question is intelligent.

Q. Look at Government's Exhibit 4 and I will ask you if that isn't exactly as the revisions were, as the government accepted them on May the 6th, according to the letter here. [195]

A. I don't know. All I can testify to is this, is our proposal to Mr. Anderson.

Q. You have got your letter in evidence here, this letter confirming verbal acceptance of the proposal made on May 6th, 1941, at which time you were authorized to proceed with the work in accordance with the revised drawings mentioned in your proposal, and there is the Exhibit 5 of May 6th, and there is the government's acceptance of May 6th. Now that is exactly as it is contained in your letter of May 30th, isn't it?

A. No, I think you are twisted here, Mr. Peterson, because this proposal we made was April 30th, and this proposal Mr. Anderson made at this time was dated April 30th. I don't know anything about Mr. Anderson's proposal of May 6th.

(Testimony of Willard A. Rushlight.)

Q. Read it there, isn't it the same?

A. No, it can't be the same. There must be another letter missing.

Q. No, the government refers to the proposal of May 6th. You have it there.

A. Oh, yes, I have too, I beg your pardon.

Q. That is the one the government referred to in accepting it, isn't it?

A. Yes, but this isn't the—exactly the same as Mr. Anderson and I made up.

Q. Isn't that the work that you did?

A. Well this includes the work he did.

Q. Doesn't that include the work that you did, the one that the government accepted on May the 6th? Is that the one? Is that the work that you did? [196]

A. Yes, sir, and Mr. Anderson's proposal here of May the 6th, he states here that he is quoting on pages M. E. 1 sub to page M. E. 15, inclusive, too. He must have known.

Q. I am talking about the items that are specifically set forth in there, and that is what the government accepted on May 6th?

A. That is what the government accepted on May 6th.

Q. And it directs on that date to proceed with the work as set forth in that letter from the government?

The Court: Mr. Peterson, as I understand the situation, this modification included items and labor and things that went beyond anything that could

(Testimony of Willard A. Rushlight.)

be chargeable to the sub-contract because it was for a sum of some twenty-three or twenty-four thousand dollars.

Mr. Peterson: Yes, there are many items in there. That is what I am trying to get at. This revision is cut out of that other, and the agreement with the government is embraced right in the word "revision" that they have there. [197]

CARL C. HALL,

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lycette:

Q. Your name is Carl C. Hall?

A. Yes, sir.

Q. Mr. Hall, where do you reside?

A. Portland, Oregon.

Q. What is your profession, Mr. Hall?

A. I am an attorney.

Q. How long have you practiced in Portland?

[198]

A. Since 1910.

Q. And have you engaged in general practice during all that time? A. I have.

Q. And you are acquainted with Mr. Rushlight and his company? A. Yes, sir.

(Testimony of Carl C. Hall.)

Q. In the past four or five years or so have you been secretary of that company?

A. I have longer than that, I think.

Q. And acting as secretary do you take an active part, or is that an honorary part?

A. I have one share of stock and I just act as a director, is all.

Q. I will ask you if in April, 1941, you made a trip to Washington, D. C. with Mr. Anderson—Eivind Anderson, the defendant in this case?

A. I did.

Q. Now without—

The Court: Fix the date and time.

Q. Can you tell us just exactly when you went, Mr.—

A. I believe it was around the 12th.

Q. Of April?

A. Of April. Very close to that, anyway, within a day or so.

Q. Where did you meet Mr. Anderson?

A. Spokane, at the airport.

Q. At Spokane, where you met him. Who else was there if anyone? A. Mr. Rushlight.

Q. Was that the first time you had met Mr. Anderson? [199]

A. It was.

Q. Now how did you happen to come to Spokane from Portland?

A. Through a telephone call from Mr. Rushlight who was then I believe, in Idaho, some place.

Q. Now prior to leaving Spokane—or Port-

(Testimony of Carl C. Hall.)

land, prior to leaving Portland did you make any telephone calls in connection with the matter on which you went to Washington, D. C.?

A. I did.

Q. To whom did you call?

A. United States Senator Rufus E. Holman.

Q. Where was he?

A. In Washington, D. C., in the Senate Building.

Q. What was the purpose of the call?

Mr. Peterson: I object, if Your Honor, please. I object as being wholly irrelevant, incompetent and immaterial. I don't quite understand——

The Court: Objection will be overruled.

Mr. Peterson: All right, Your Honor.

The Witness: Now if you will repeat the question.

Q. I say, what was the purpose of the call?

A. I had been requested by Mr. Rushlight to go to Washington on this job, telling me that they had an underground—he had an underground information——

Mr. Peterson: I object to that.

The Court: I will sustain the objection.

A. All right, to ask Senator Holman to find out if this job had been let, this job in question—this contract.

Q. Had been let to whom? [200]

A. Well, to somebody besides Anderson.

Q. And did you ask him to do anything while you were waiting? A. I did.

(Testimony of Carl C. Hall.)

Q. What did you ask him?

A. I asked him to find out if it had been let.
Mr. Peterson: I object to what he did.

Mr. Lycette: I will show that this was communicated to Mr. Anderson and approved by him.

The Court: Based upon that theory I will let him answer. Objection overruled.

A. If I got the question right, the answer is this: that I asked Mr. Holman to find out whether it had been let or not. If it had not been let to see if he could get his foot in the door and hold it up—the letting of it, until I got there and he said he would.

Q. All right, then you went on to Spokane from Portland. How did you get there, by train? You went by train?

A. I did not go until after I heard from Senator Holman.

Q. Then you proceeded to Spokane by train, did you? A. Yes.

Q. Arrived there?

A. I believe I went by train. I believe I did, yes.

Q. You arrived there early in the morning?

A. Yes.

Q. Did Mr. Anderson arrive the same day?

A. The same day?

Q. Yes. A. Yes.

Q. And he came in by what method? [201]

A. By airplane, Northwest, I believe.

(Testimony of Carl C. Hall.)

Q. Prior to the time Mr. Anderson arrived did you discuss the matter with Mr. Rushlight, without saying what your discussion was?

A. Yes, I did.

Q. Then when Mr. Anderson arrived by plane, had you procured a ticket to go on the plane?

A. Mr. Rushlight procured my ticket for me.

Q. You went out to the airport and there met Mr. Anderson? A. Yes, sir.

Q. How long was the plane there, approximately?

A. Well, a very few minutes. I couldn't tell you exactly.

Q. Will you tell us—then you were introduced to Mr. Anderson?

A. I was introduced to Mr. Anderson.

Q. Will you just tell us briefly what the discussion was there, before you left, between yourself and Mr. Anderson and Mr. Rushlight? Now you can leave out, unless counsel desires it, any contractual relation on attorney's fees as between yourself and Mr. Anderson as that is the subject matter of another lawsuit, but what pertains to this action.

A. All right. Part of what I said to him was that I had the promise of Senator Holman that he could hold the matter up till we arrived, and I said "Now Mr. Rushlight has told me that you have agreed to give him this contract for three hundred thousand dollars," and I will leave out the attor-

(Testimony of Carl C. Hall.)

ney's fees end of it, because that is immaterial. I says, "is that right?"

Mr. Peterson: Put the whole thing in. [202]

A. All right, and I said—

Mr. Lycette: Counsel can bring it out.

A. (Continuing): I said, "Is that right, if you get this contract—if you go back to Washington and you get the contract, does Mr. Rushlight get the sub-contract on his sub-bid of three hundred thousand?" and he said "Yes, sir, he does. That is the agreement."

Q. Now was there anything said between you and Mr. Anderson about what you were to do in Washington, what your purpose of going to Washington was?

A. Well, it was to get this contract. That is all there was to that.

Q. Did you tell Mr. Anderson at that time or on the trip or at any time that you had been or were Senator Holman's campaign manager?

A. No, sir, I did not.

Q. Were you ever his campaign manager?

A. No.

Q. And you never told him any such thing?

A. No.

Q. Mr. Anderson said here yesterday he did not know you were a lawyer until today. Did you discuss with him that? Did you know that?

A. I discussed with him a fixed fee before I got on the plane, and the expenses.

(Testimony of Carl C. Hall.)

Q. About how many days did you and Mr. Anderson spend together from the time you left Spokane until he went his way and you went yours?

A. I think it was approximately two weeks—pretty close to it. [203]

Q. Now after you left Spokane and while you were on the plane or after you got to Washington, D.C. was there any discussion between you and Mr. Anderson as to what he knew, or what was happening to his contract? Did he tell you what was happening to his bid? A. Yes.

Q. What did he tell you in that respect?

A. I don't know as he told me who told him, but he told me that they had received an underground that the probabilities were it was going to some other bidder and not the low bidder and he was the low bidder.

Q. When you got to Washington, who paid the—did you stay in the same hotel with Mr. Anderson?

A. I did, right in the next room.

Q. Just as a sidelight, the first day or two, why, you stayed in a private residence?

A. We slept in a—the first night we couldn't get in a hotel and we slept in a dining room out in a residence. The lady's name happened to be Mrs. Hall, I remember that very well, she was an elderly lady—on two cots.

Q. Who procured it?

A. Mr. Anderson made the arrangements for

(Testimony of Carl C. Hall.)

the residence through, I believe, a bureau of the Chamber of Commerce.

Q. When you went to the hotel later, who paid the hotel bills there?

A. Mr. Anderson paid everything.

Q. Mr. Anderson denies he had given you any expense money. Did he give you any expense cash money?

A. He gave me a hundred dollars.

Q. Now, without going into great detail, during the time [204] you were in Washington, D.C., did you go from office to office with Mr. Anderson?

A. We certainly did, from office to office.

Q. And—— A. Time and again.

Q. And before you left Washington, D.C., were you and Mr. Anderson advised to go, by anyone, that the contract would be awarded to Mr. Anderson on his low bid? A. Yes, sir.

Q. Then you left—who left Washington first, then? A. Mr. Anderson.

Q. He went up to——

A. Well I don't know where he went. He told me he was going to see his son. I believe it was up in Boston, or some place up in that direction.

Q. And you came on home?

A. I came on home.

Q. Did you leave the same day or a different day?

A. Well, I couldn't tell you unless I looked at my records. I believe I left later in the day. No,

(Testimony of Carl C. Hall.)

he did, but I might have left the next day, I don't know.

Q. Mr. Anderson testified yesterday that you went to Washington on some other or different business. Did you have any other or different business in Washington?

A. Absolutely none.

Q. Did you attend to any other business in Washington?

A. I did not, not a thing.

Q. Now, did you——

A. In fact, I did not want to go.

Q. Now did you have anything to do further with this con- [205] tract until May 9th, the date—the time Mr. Rushlight gave him a written proposal?

A. Well, I don't remember the exact date, but I went with Mr. Rushlight to Tacoma and we went down to Mr. Anderson's home.

Q. Just before you go any further on that, without repeating the conversation, did Mr. Rushlight speak to you regarding this contract with Mr. Anderson and request you to come up here and see Mr. Anderson with him?

A. He said this, that——

Mr. Peterson: I object to that.

The Court: I will sustain the objection to the conversation. You can answer "yes" or "no" to the question propounded to you.

A. I came up at his request, yes.

(Testimony of Carl C. Hall.)

Q. Where did you see Mr. Anderson?

A. In his home.

Q. Does he have a little office there some place?

A. He had an office in the basement, as I remember.

Q. I will show you Plaintiff's Exhibit 8, which is a proposal bearing date of May 9 in longhand and I will ask you was that proposal submitted to Mr. Anderson at the time you were there?

A. Yes, I believe so.

Q. Now will you tell us what discussion you had or was had by Mr. Rushlight in your presence with Mr. Anderson on May 9, when this proposal was delivered to him?

A. Well, they were discussing it, why he should take this contract at less than three hundred thousand—that was the deal, and I was made about it because I had gone [206] clear east for this thing and expected them to keep their agreements, both of them, and I said to Anderson, I said, "Anderson, you know darn well you agreed on three hundred thousand" and he said "Yes, I know I did, but I am not going to do it." That was his answer to me.

Q. Now in that meeting there on which this Plaintiff's Exhibit 8 was submitted, was there any discussion whatsoever of any substituted or changed plans or specifications, as far as you can recall?

A. No.

Q. The word "revised" is—you will find written on this letter in Mr. Rushlight's handwriting.

(Testimony of Carl C. Hall.)

Do you know who requested that, or how that got on there? Do you recall?

A. No, sir, I don't. I don't remember it being discussed.

Q. You have no recollection of the word "revised"? A. No, I do not.

Mr. Lycette: I think that is all, you may examine.

The Court: It is a little after time for the afternoon intermission, so we will take a recess for twelve minutes.

(Recess.)

Cross Examination

By Mr. Evenson:

Q. Mr. Hall, I will hand you Exhibit 8 which is the much discussed proposal of May 9. I understand you were [207] present in Mr. Anderson's house at the time that was signed?

A. I was there once, and it may have been this time and I believe it was.

Q. Well, you discussed in your direct examination some remarks about a three hundred thousand dollar proposition.

A. Yes, sir, that is right.

Q. And that is referring to this same contract job that appears written into that exhibit as two hundred and ninety-three thousand?

A. Yes, that was about the first conversation we had.

Q. Well were you representing either of these gentlemen as attorney at that meeting? By gentle-

(Testimony of Carl C. Hall.)

men I am referring to Mr. Rushlight and Mr. Anderson.

A. Well, I don't know how you would put it. I was not representing Mr. Anderson at that time. I went there to try and straighten them out and get them to both keep their agreements.

Q. This writing Exhibit 8 is the result of this meeting, whatever they discussed?

A. I think that is correct.

Q. You saw the handwriting put in that document? A. Did I, at that time?

Q. Yes, that is, were you there up to the time this was finished and actually handed over?

A. Well, I don't know. I was in and out and so to say I saw this handwriting in here, I would not say "yes" or "no", to be honest.

Q. You don't know how the word "revised"—

A. I—they finally arrived on a two hundred and ninety- [208] three thousand dollar price.

Q. You did know that?

A. Yes, sir, after a long discussion.

Q. In connection with that same matter, look at Exhibit 5 and tell me at that time whether you had that exhibit before you, which is the May 6 letter, or a copy of it, so you were then informed of the contents of that Exhibit 5?

A. I wouldn't remember—I wouldn't know. It is just a bunch of figures to me, here.

Q. Do you recognize that as the actual proposal that was made to the government, or at least it so purports to be?

(Testimony of Carl C. Hall.)

A. I don't believe I saw it at all. That would have to be my testimony. I can't remember that I ever saw that.

Q. One more question——

A. I might have seen it, I want you to understand that, and couldn't remember it.

Q. Would you look at Exhibit 7 and tell me whether you reviewed that before it was signed?

A. Before it was signed?

Q. Yes, signed.

A. I don't believe so. I might explain myself, if you will permit. Just at that time there was a tremendous lot of these contracts and to be honest with you I couldn't tell you whether I saw that before, but my best impression is that I did not.

Q. You may have?

A. I might have seen it, but I doubt it very much.

Mr. Evenson: That is all. [209]

By Mr. Peterson:

Q. Mr. Hall, do you have any letters in writing, written by you or by Mr. Rushlight or by Mr. Anderson, showing any bid or acceptance of a bid for three hundred thousand?

A. No.

Q. What? A. No, sir.

Q. Do you have any letters at all, written, embracing the trip to Washington, or confirming the trip? A. I do not.

Q. Nothing in writing?

(Testimony of Carl C. Hall.)

A. I had about five to ten minutes to talk to them. That is all I had and I took their word for it.

Q. Nothing was written in Washington, D.C. or anything at all, concerning any—

A. Not a thing.

Q. (Continuing): —concerning any three hundred thousand dollars. It is all oral?

A. Pardon, me?

Q. It is all oral? A. All oral.

Q. Mr. Hall, when you were at Washington, D.C. did you hear any discussion involving this contract—that the contract was being held up because they were contemplating boiler revisions in Fort Lewis?

A. No, I don't think so. There might have been some discussion of that but it didn't sink in. I knew whatever it was they were passing the buck. They just didn't want to give us the contract. That is, the engineers.

Q. Do you know whether there was to be any revisions in the [210] boiler?

A. No, I don't.

Q. You don't. All right, that is all.

A. My best memory is that there was nothing of that kind discussed, but there might have been.

The Court: You were asked, Mr. Hall, on Exhibit 8, I think it was, that was written in pen and ink across it "revised", if you knew anything about that and I don't think you answered. I

(Testimony of Carl C. Hall.)

think another question was propounded before you answered. Do you know—is that Exhibit 8?

The Clerk: Yes, it is.

The Court: At the top of that?

A. I intended to answer that that I do not. I did not know there was anything written there “revised.”

The Court: Well was there any discussion there as between the two parties here involved, Mr. Anderson and Mr. Rushlight, as to a revised specification that would place a greater burden upon the contractor?

A. No, sir, it was all a question of a revised or substituted price. That is all that was discussed.

The Court: That was on the sub-contract?

A. It was on the sub-contract, the difference between three hundred thousand, and it was finally signed up at two hundred and ninety-three. I believe.

The Court: But no discussion as to the fact that the government was going to make some revision that would of itself imply an increase in the total contract? A. No discussion. [211]

Q. You received your payment for the revision of this power house in accordance with your bid, did you not?

A. Yes, I think so. I think that has been allowed. [213]

(Whereupon document referred to was received in evidence and marked Plaintiff's Exhibit No. 18.)

(Testimony of Carl C. Hall.)

This is a registered letter received 12/29-41.

PLAINTIFF'S EXHIBIT No. 18

WAR DEPARTMENT

Office of the Constructing Quartermaster
Fort Lewis
and Vicinity

Fort Lewis, Washington

December 20, 1941

400 Bed Hospital & 36
Misc. Buildings
Serial Letter No. 178

Mr. Eivind Anderson
517 North I Street
Tacoma, Washington

Subject: Termination of Right to Proceed.

Dear Sir:

Due to your refusal and failure to prosecute the work in connection with the above-described contract, with such diligence as to insure its completion within the time specified in the contract, or any extension thereof, and due to your failure to complete said work within such time, the Government does hereby terminate your right to proceed with the work, effective immediately.

The Government will take over the work and prosecute the same to completion by contract, or otherwise, and you and your surety shall be liable to the Government for any excess cost occasioned the Government thereby, including all delay.

(Testimony of Carl C. Hall.)

This right is exercised by the Government pursuant to Article 9 of your contract.

Very truly yours,

E. P. ANTONOVICH

E. P. Antonovich

Lt. Col., Corps of Engineers

Constructing Quartermaster

cc: Continental Casualty Company

[Endorsed]: Filed Apr. 7, 1944. [216]

Mr. Lycette: I think the plaintiff will rest at this time. [217]

CHARLES CRAWFORD WYATT,

produced as a witness on behalf of the Defendants, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Your full name, Mr. Wyatt?

A. Beg pardon?

Q. Your full name?

A. Charles Crawford Wyatt.

Q. How do you spell your last name?

A. W-y-a-t-t.

Q. And Mr. Wyatt, in May of 1941, with whom were you employed?

A. I was employed by the Roy T. Early Company.

(Testimony of Charles Crawford Wyatt.)

Q. Of what city?

A. Tacoma, Washington.

Q. Of Tacoma, and they were engaged in what business?

A. In general construction, but long with that they were official representatives of the Erie City Iron Works, manufacturers of boilers.

Q. And what was your work with that company?

A. I was personally the sales agent. In other words, I had [220] brought the account to the Roy T. Early Company because I had been associated with Erie for eight or ten years previously.

Q. And Mr. Wyatt, you know Mr. Eivind Anderson here, the defendant? A. Yes, sir.

Q. And do you know Mr. Rushlight here?

A. Yes, sir.

Q. Showing you, Mr. Wyatt, Plaintiff's Exhibit 17, I will ask you—that is in three pieces—will you explain to the Court what that is?

A. This first slip of paper is—you want the circumstances surrounding it?

Q. Yes.

A. Well briefly that is, Mr. Rushlight called me on the telephone on the 6th of May.

Q. Of what year?

A. Of 1941, and said that he either was or had been at Fort Lewis and that the alternate, which is the revision—you refer to as the revision, had been accepted and for me to wire the order into the Erie City Iron Works. I told him that I

(Testimony of Charles Crawford Wyatt.)

couldn't wire them in without some sort of a written order, and he told me that if I would come up to the Winthrop Hotel that would be taken care of.

Q. At the Winthrop Hotel in Tacoma?

A. In Tacoma.

Q. Did you go up there?

A. I went up there.

Q. All right then, will you tell the Court under what circumstances that order was given you?

[221]

A. Well I went up to the Winthrop Hotel and he simply wrote this piece of paper out, at the same time calling Mr. Anderson on the telephone saying that I would be out to Mr. Anderson's house for a formal signature on the contract.

Q. And you saw Mr. Rushlight write that out, and to whom did he give it to?

A. He gave it to me personally.

Q. And you were familiar with that particular order out there, were you, Mr. Wyatt?

A. Very much so.

Q. You had made several trips to Fort Lewis on it? A. Yes.

Q. And I will ask you if those boilers under that order were for the revision or——

A. Yes, they were in the revised specification.

Q. And then what did you do with that?

A. I took this slip of paper out to Mr. Anderson and handed it to him and at the same time I

(Testimony of Charles Crawford Wyatt.)

took this other letter which became the contract out to Mr. Anderson and he signed it.

Q. You went and prepared those between the time Mr. Rushlight gave you the order and then brought the contract out to Mr. Anderson?

A. Yes, but that is a little bit—it will take a minute to explain that I had previously—had written a letter approximately a week before that could have been used as a contract, but it couldn't be used now because the previous quotation had contained the boiler and the brick work, and when Mr. Rushlight called me over the telephone [222] he stated that he would like to eliminate—he had some one else that he would like to do the brick work, so that necessitated my writing another letter, so after Mr. Rushlight called me on the telephone I went up to the hotel and got this slip of paper and came back to the office and had this letter typed out.

Q. And that is the letter the counsel—is the second portion of Government's Exhibit—what is that 17, or what is that?

The Bailiff: Seventeen.

Q. 17, and Mr. Wyatt, will you tell the Court why the—how the contract came to be made with Mr. Anderson? A. Well, it was simply—

Q. Or Mr. Anderson, and not directly with Mr. Rushlight?

A. Well primarily I was interested in the boiler sale, not the contract.

Q. Yes?

(Testimony of Charles Crawford Wyatt.)

A. And I had the territory for Erie in the state of Washington. In other words, I should not—I was not allowed to sell boilers in Oregon, but I was allowed to sell them in Washington. Therefore, I wanted to do business with a Washington contractor.

Q. Did you explain that to Mr. Rushlight?

A. Yes, sir.

Q. And he approved that? A. Yes, sir.

Mr. Peterson: That is all, Mr. Wyatt.

We offer now, if Your Honor please—has 17 been admitted? We offer in evidence, if Your Honor please, Exhibit—Plaintiff's Exhibit 17, to which is attached a [223] letter of May 7th, 1941, from Roy T. Early, and another letter of May 17th—May 7th, 1941, from Roy T. Early. We offer that in evidence as one exhibit.

Mr. Lycette: I don't know whether that should take your number or my number. I identified it, but did not offer it.

The Court: I do not think it is material.

Mr. Peterson: That was admitted in evidence?

The Court: Yes.

(Whereupon documents referred to were received in evidence and marked Plaintiff's Exhibit No. 17).

(Testimony of Charles Crawford Wyatt.)

PLAINTIFF'S EXHIBIT No. 17

You are hereby authorized to place order for 2 Erie City Boilers complete with all trim and accessories as specified and as per your letter of Apr. 29, 1941. Formal order will be signed by Eivind Anderson for our acct. For the sum of 16,924.00.

Boilers to be del. & erected for above price.

A. G. RUSHLIGHT & CO.

W. A. RUSHLIGHT,

Pres.

Telephone Main 4444

Roy T. Earley Co.

Engineers—Builders

Tacoma, Washington

May 7, 1941

Mr. Eivind Anderson
517 North I Street
Tacoma, Washington

Dear Sir:

The enclosed copies of contract covering the purchase of two 420 H. P. Type C, Erie City Water Tube Boilers required by specifications for 400 bed hospital, Ft. Lewis are submitted for your signature and formal order as per attached instructions given to us by the A. G. Rushlight Co.

You will note that the brickwork included in our original proposal of April 29th has been omitted at the request of Mr. Rushlight.

It will be appreciated if you will sign and re-

(Testimony of Charles Crawford Wyatt.)

turn two copies of the attached contract at your earliest convenience.

Very truly yours,

ROY T. EARLEY CO.

By C. C. WYATT

District Sales Agents,
Erie City Iron Works

CCW::s

Telephone Main 4444
Roy T. Earley Co.
Engineers—Builders
Tacoma, Washington
May 7, 1941

Mr. Eivind Anderson
517 North I Street
Tacoma, Washington

Boilers for 400 Bed Hospital
Fort Lewis, Washington

Dear Sir:

Referring to the Government specifications, we are pleased to offer 2-420 H. P. Type C, 3 drum water tube boilers as shown on the attached marked up drawings #69882-D, being our designation #4-C-24 set 10' from floor to center line of lower drum for an Iron Fireman spreader type stoker, 200% of rating.

Each boiler will consist of 3-38" Class One fusion welded drums, all for 160# design pressure, " integral steam header with 8" steam outlet at one end, 2½" O.D. seamless steel tubes .105" in thick-

(Testimony of Charles Crawford Wyatt.)

ness, or a total of 552 tubes per boiler. Each boiler will be provided with the necessary access, observation, and explosion doors. The drums will be fitted with 12"x16" manhole plates in both heads and have internal continuous blow-down pipes and valves and including a vent valve but no outside piping. Baffle would be as shown consisting of drainable type monolithic construction with tile and steel plate and any required castings, etc., for baffle system.

Steelwork will be complete to support the boilers entirely independent of brickwork for a setting height of 10' from floor to center line of lower drum including roof cover plate, damper box with damper on roller bearings, wall binders, rear soot hoppers with gates but no piping and the double rear steel panel construction including the insulation which will be installed at the factory.

Steam trim is included per boiler as follows:

- 1-#5 Reliance high and low alarm water column
- 1-PBH vertical water gauge
- 1-8½" Ashcroft #1010 steam gauge, iron case with brass rim
- 3-PBH gauge cocks with chains
- 1-2½" Yarway cast steel blowoff unit
- necessary safety valves, being Consolidated #1411
- 1-2" Lunkenheimer feed valve #410
- 1-2" " check valve #625

(Testimony of Charles Crawford Wyatt.)

necessary piping for water column and steam gauge.

Piping for the blowoff from the drum to the outside of the setting as usually furnished.

We have not included any front plate for the boiler as we understand that this will be furnished by the stoker manufacturer.

We have not included any special tools such as tube expanders or tube cleaners.

The price of the two boilers as described above
Government
and in accordance with the specifications, completely delivered and erected on foundations to be furnished by the purchaser is \$16,924.00.

We have not included any boiler efficiency or acceptance tests in our price but have two qualified mechanical engineers in this office who will devote any necessary time to cooperate on tests, and be present to help conduct and operate the equipment during such tests. There will be no extra charge for this service.

Shipment on these boilers will be made from the factory five weeks from the date of this order and receipt of final details.

Terms of Payment: As received by purchaser

(Testimony of Charles Crawford Wyatt.)
on monthly Government estimates. Final payment
30 days after installation is complete.

Very truly yours,

ROY T. EARLEY CO.

By C. C. WYATT

C. C. Wyatt

District Sales Agents

Erie City Iron Works

Accepted by:

EIVIND ANDERSON

Received check June 16th, 1942 final payment.

ROY T. EARLEY CO.

By C. C. WYATT

June 16, 1942.

[Endorsed]: Filed Apr. 7, 1944.

Cross Examination

By Mr. Lycette:

Q. Mr. Wyatt, you had discussed with Mr. Rushlight the matter of these boilers considerably prior to this letter of May 6th, had you not?

A. Yes, sir, that is true, about a week or so I should think.

Q. Mr. Rushlight approached you after they knew that there was going to be—that there was a call for a revised proposal on the boiler house and discussed it with you, what he could get the boilers for to fill that, did he not?

(Testimony of Charles Crawford Wyatt.)

A. I believe that is correct. I think he originally called me to ask for a price.

Q. And that would be about—would that be about April 30th that he had that discussion with you, or April 29th?

A. Well, you see I had been working on this job for about a month, and other contractors had been calling, and it must have been some time within a month. I wouldn't tie it down to a week or— [224]

Q. You do recall however, that at least a week or so prior to the date of this letter he had been in getting information as to what those boilers would cost, for the purpose of submitting a figure on the revised proposal, is that correct?

A. That is correct.

Q. And by the way, boilers of this type were extremely difficult to get at that time, were they not? A. That is right.

Q. Did you happen to have these boilers in stock at that time?

A. They were partially in stock. They required very little fabrication to complete.

Q. It is true that if a person needed those boilers at that particular time and did not get those that were in stock they would have been held up for a long period of time, would they not?

A. That is right.

Q. This particular type of boiler was in considerable demand, too, was it not, at that time?

(Testimony of Charles Crawford Wyatt.)

A. Yes, the army used a great many of them.

Mr. Lycette: That is all, thank you.

Mr. Peterson: That is all, Mr. Wyatt.

(Witness excused) [225]

FRANK T. HOLERT, JR.,

produced as a witness on behalf of the Defendants, after being first duly sworn, was examined and testified as follows:

Direct Examination [225]

Q. Now, Mr. Holert, at the time you talked to Mr. Rushlight over the 'phone, had you seen the substituted specifications that related to the boiler house? A. No specification, no.

Q. You had not seen them? A. No.

Q. Did you at any time in the course of your construction work see the specifications under which the boiler house and the boilers were actually built?

A. Are you talking about plans or specifications?

Q. Specifications.

A. I saw the standard specification on the general contract. I have a copy of those.

Q. You had a copy of those?

A. That is right.

Q. Did you ever get a copy of the substituted specifications for the boiler house?

A. I did not get a copy of them, no.

Q. Did you see a copy of them?

A. I think I read them, yes. [260]

(Testimony of Frank T. Holert, Jr.)

Q. Do you recall when you read them?

A. No, I don't.

Q. I will hand you Plaintiff's Exhibit 15, and I will ask you to look at that exhibit and see if that is the set of substituted specifications which you say you saw or looked at?

A. Yes, I think this is it. I am sure it is.

Q. There isn't any question in your mind but what there were put out substitute specifications for the boiler house?

A. Oh, no, I read them. As I say, it was not in my contract so I didn't get them.

Q. Do you know where you saw them—who furnished them to you?

A. Mr. Anderson.

Q. Mr. Anderson furnished them to you. Did he tell you what they were when he furnished them to you?

A. Yes.

Q. Is there any question about that in your mind at all?

A. No. [261]

ARTHUR ANDERSON

produced as a witness on behalf of the Defendants, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Your full name?

A. Arthur R. Anderson.

(Testimony of Arthur Anderson.)

Q. And Mr. Anderson, where do you reside?

A. I reside in Riverton, New Jersey.

Q. And where is that with reference to Philadelphia?

A. It is right across the river from Philadelphia.

Q. Mr. Anderson, what is your work?

A. I am head of the technical department of the Cramp Shipbuilding Company.

Q. Your profession is what?

A. I am an engineer.

Q. You are an engineer, and you are the son of Eivind Anderson here? A. I am.

Q. And I will ask you whether or not you have been with your father on several of these construction jobs? A. I have.

Q. Mr. Anderson, you were called to this job by your father. Where were you working at the time?

A. I was stationed in Boston, and working on the staff at the Massachusetts Institute of Technology.

Q. By the way, you are a graduate also of that institution, are you? A. That is correct.

Q. And when did you come to Tacoma, then?

[278]

A. I came to Tacoma in 1941. I believe I arrived on the 2nd of May.

Q. All right. I will ask you, Mr. Anderson, whether you were present at your father's house on May 9th when Mr. Hall and Mr. Rushlight appeared? A. I was.

(Testimony of Arthur Anderson.)

Q. Showing you Plaintiff's Exhibit 8, I will ask you—which is the proposal of May 9th for the doing of this job—I will ask you when you first saw that?

A. Mr. Rushlight brought this to the house some time after dinner of the evening of—

Q. To whose house?

A. To my father's house.

Q. Who was present?

A. Mr. Rushlight and Mr. Hall, my father and myself.

Q. And what writing was on that letter when Mr. Rushlight presented it?

A. When Mr. Rushlight presented it, it was written in the sum of the proposal, \$293,000.00 and up in the upper right hand corner was written "revised".

Q. All right. All right, now, then, did he add anything to that when he came, and if so, what?

A. Yes, sir, I noticed that the date was April the 3rd, and being as it was May the 9th, I questioned why that was dated back and he said that it was an old form that he had, but he had written in "revised", which brought it up-to-date.

Q. All right, what was said about changing it to May 9th?

A. Well we insisted it be brought up to date and he then wrote in his longhand writing, May the 9th, instead of [279] April 3rd.

The Court: That is April 30th?

A. No, April 3rd, Your Honor.

(Testimony of Arthur Anderson.)

Q. He wrote in——

A. The correct date, May the 9th.

Q. Mr. Anderson, I will ask you whether there was any dispute over—at that time, whether there was any dispute or argument or any statements made concerning the price?

A. I can't recollect any dispute because he brought this proposal to the house already written in. He had his amount stipulated when he brought it to the house.

Q. And I will ask you if there was a dispute or argument that night?

A. Well there was some discussion that evening regarding the furnishing of a surety bond, and——

Q. I will ask you whether or not your father insisted that he furnish a surety bond?

A. That was insisted.

Q. What?

A. He insisted that a surety bond be furnished.

Q. And I will ask you whether or not there was not considerable discussion over that?

A. Yes, there was.

Q. And what did Mr. Hall say in that respect?

A. Mr. Hall argued that it would cost considerable money to buy this bond and he saw no need for spending the money for the bond.

Q. And that meeting on that subject extended for how long?

A. Oh, I can't recall exactly how long but it went on into the evening, and as I recall it the discussion ended [280] with the assurance that this

(Testimony of Arthur Anderson.)

proposal would be accepted contingent on the furnishing of a bond.

Q. And what did your father say the next day that he would accept the proposal?

A. He would accept the proposal in writing and that a bond would be required.

Mr. Peterson: That is all.

Cross Examination

By Mr. Lycette:

Q. Now you say that, Mr. Anderson, that when Mr. Rushlight arrived the amount of two ninety three was all written in, is that correct?

A. Yes, sir.

Q. In this exhibit—what is the number?

Mr. Peterson: There it is, number 8.

Mr. Lycette: Exhibit 8.

Q. Then there was no discussion over the amount of the contract?

A. As I recall the amount had been set and it was written in, and had been established.

Q. From the lack of anything being said about the amount of the contract and the fact that it was already written in there, you assumed that had been determined and agreed upon prior thereto between your father and Mr. Rushlight?

A. Presumably, yes.

Q. There wasn't anything, as I understand, that would cause you to believe or feel that evening that the amount had not prior thereto been agreed upon. Now of course you [281] observed—you testified

(Testimony of Arthur Anderson.)

that this was dated back on April 3rd, 1941, and you say that when you noted that you asked Mr. Rushlight why that was there, is that correct?

A. I questioned it, yes.

Q. And he told you that this was an old form that he had used? A. Yes.

Q. Did you learn then during the evening or otherwise that he had submitted a bid to your father under date of April 3rd, 1941?

A. I don't recall any bid—any such bid having been made.

Q. Well, of course you were not here in April. You did not get here until May, did you?

A. Yes.

Q. That is correct, isn't it? A. Yes.

Q. But the subject did not come up?

A. That is, no bid in writing was made at that time. I didn't see any written bid.

Q. When you saw this April Three on there, '41, didn't you ask him "Well, did you submit Dad a bid back in April, on April 3rd?"

A. No. The only thing that I questioned was that a bid would be brought out at that time—a written proposal and have it back dated. It looked irregular to me.

Q. Well, and when it looked irregular you spoke about it?

A. Then he immediately corrected it.

Q. Some place in the conversation did it come up that on April 3rd, prior to the time your father even bid the [282] contract, that Mr. Rushlight

(Testimony of Arthur Anderson.)

had given your father a bid? That did not come up at all? A. No.

Q. Well, when he said it was an old form did you pursue that subject any further? A. No.

Q. Didn't you wonder at the time why an old form would have your father's name written in on it and dated back? A. Yes, I did.

Q. But the inquiry was dropped as soon as he changed it? A. Yes.

Q. Did you read this bid over that evening while you were there with your father?

A. I believe I glanced through it, I don't recall in how much detail.

Q. Did your father look it over while Mr. Rushlight was there? A. I believe he did.

Q. Did he look it over with considerable care?

A. I don't recall that. I presume he did, though.

Q. Well, now, you were present of course during this time? A. Yes.

Q. Well there was a discussion about his accepting the bid, wasn't there?

A. The discussion as I recall was primarily over this bond and the cost of it and so on.

Q. As though all the other details had been determined prior thereto?

A. That is right.

Q. During the evening or before the evening was over and [283] Mr. Rushlight and Mr. Hall left, your father did indicate that he was going to accept this and give them a letter the following day in writing?

(Testimony of Arthur Anderson.)

A. I believe that is correct.

The Court: I think we will take the morning recess now.

(Recess)

Mr. Lycette: I have no further questions.

Mr. Peterson: Just one question I wanted to asked you, Mr. Anderson. The term "plans" and "drawings" in the engineering world mean the same thing?

A. Yes, they are used interchangeably.

Mr. Peterson: That is all.

(Witness excused) [284]

EIVIND ANDERSON,

recalled as a witness on behalf of the Defendants,
was examined further and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Mr. Anderson, you are the defendant in this case? A. I am.

Q. What is your business, Mr. Anderson?

A. Contracting.

Q. And how long have you followed the contracting business?

A. Oh, approximately thirty-five years.

Q. Thirty-five years in this vicinity?

A. Yes.

Q. And that has involved what general type of construction?

(Testimony of Eivind Anderson.)

A. Well, it is building construction, involving residence types and commercial types, post offices and other government projects like the hospital project at Fort Lewis, and similar projects.

Q. And those—in building on those jobs they require estimates, do they, estimating?

A. Estimating is involved in making those bids.

Q. And who does the estimating on your behalf, in figuring those jobs?

A. I have always done my own.

Q. And you have done that for how many years?

A. Ever since I started to contract.

Q. And now then, Mr. Anderson, when were the bids on this particular job opened?

A. They were opened at Fort Lewis in the office of the constructing quartermaster. [285]

Q. On what date?

A. April 8th, 1941.

Q. April the 8th, and you had—your bid had been put in before, put in on the entire job?

A. It was put in, I would say, about—it might be fifteen minutes before the hour of the opening of the bids. I brought it there personally.

Q. And Mr. Anderson, who made up the estimate for your general bid? A. I did.

Q. And counsel asked you—or I think it was some statement made here in the testimony as to whether or not you had a plumbing estimate. Did you make up a plumbing estimate on your job?

A. Yes, sir, I had a tentative estimate on the

(Testimony of Eivind Anderson.)

plumbing and heating, and all the work combined that comes under those headings of the specifications.

Q. Your bid going into the government is an itemized bid, is it?

A. Yes, it is an itemized bid and it is set up for that purpose by the government, if they desire to divide the contract and to delete certain units, or add more units to it at those fixed prices, that is set up in the bid.

Q. Mr. Anderson, will you tell the Court what you estimated the plumbing to be?

Mr. Lycette: Object as immaterial.

Mr. Peterson: It was rumored here, or I think stated in the testimony, it was \$300,000.00.

Mr. Lycette: The question whether he had a bid from Mr. Rushlight. The testimony of course is that he [286] did have a bid from Mr. Rushlight for \$300,000.00. That is the inquiry, not what he estimated.

The Court: I am going to give you an opportunity to fully cross-examine. Objection will be overruled.

Q. What was the estimate?

A. The figure on that was \$286,600.00, as I recall it.

Q. Now (then, up to the time of putting in your bid on April the 8th, will you tell the Court whether you had any negotiations with Mr. Rushlight, whatever? A. I did not.

(Testimony of Eivind Anderson.)

Q. Had you received——

Mr. Lycette: Pardon, I did not get the answer.

Mr. Peterson: "I did not" he said.

Q. Had you any oral bid from him?

A. No, I did not.

Q. Any written bid?

A. No bid whatsoever from Mr. Rushlight.

Q. Had you been in communication with him in any manner?

A. Well, I met him in connection with that job when I went over to Fort Lewis with my bid.

Q. That was on April the 8th, but up to that time—prior to that time had you had any?

A. No, I had not.

Q. When did you first meet him, then?

A. He joined us going out to Fort Lewis, in the car that I was riding in, driven by the agent for the bonding company who came to my house, prior to my closing of my bid, with the bid bond which had to be inserted in the bid—in the proposal.

Q. And Mr. Rushlight was in the car? [287]

A. Mr. Rushlight joined us as we went to Fort Lewis on that trip. The agent of the bonding company stopped in town and said that he wanted to pick up Mr. Rushlight; that he had asked him to ride out there.

Q. Where did you pick him up?

A. Outside of the Winthrop Hotel.

Q. All right. Now, then, Mr. Anderson, he accompanied you to Fort Lewis?

A. Yes, he was riding in the car to Fort Lewis.

(Testimony of Eivind Anderson.)

Q. And I will ask you, Mr. Anderson, whether you had disclosed to anybody, sub-contractors or any one else, the amount of your bid at Fort Lewis?

A. No, I certainly would not do that.

Q. Is it the custom of the general contractors to ever disclose such matters to sub-contractors or others?

A. Not unless he wants his bid to be known before he put it in, and it might be subject to under-bidding by some one else.

Q. All right, then, Mr. Anderson, after the bids were opened, what did you do on April 8th?

A. Well, after the bids were opened there generally isn't much to do on a situation at that time. The bids were submitted for consideration of the awarding authorities, and of course it is not altogether a patented affair that the low bidder gets the bid. That is, of course, a general custom, but naturally those things must be considered by the contracting officer and it takes time to analyze the various proposals.

Q. Within what time does it provide for the acceptance?

A. It gives thirty days to the government to determine the [288] acceptance.

Q. Now, Mr. Anderson, when did you leave Mr. Rushlight then, on April the 8th?

A. Well, I think that has been stated. He joined us going out to Fort Lewis outside of the Winthrop Hotel, up here in town.

(Testimony of Eivind Anderson.)

Q. All right. When did you see Mr. Rushlight next?

A. The next time I saw him, Mr. Rushlight, was at the airport at Spokane.

Q. And what was that?

A. On my trip to Washington.

Q. What was the approximate date?

A. I would say that was on April the 12th.

Q. All right, had you at that time, Mr. Anderson, encountered any trouble about your not receiving the bid or the contract?

A. No, there was no trouble to encounter. I did make a trip to Fort Lewis about the second day, I think it was, after this bidding to consult the constructing quartermaster there if he had any information then as to what way he expected the bid to be awarded, and he said that he had not, and he said that it generally took several days before he would be informed from Washington, and of course I was anxious to find out just how he felt and what he had recommended and so forth, and who was going to get the bid and asked several questions that way and he said—

Q. How did you come to meet Mr. Rushlight at Spokane?

A. Prior to the time that I decided to go back east, he called me over the telephone long distance, some place in Idaho. He said he was—I don't recall what the [289] station he called from, but anyway that was—I recall he said he was in Idaho and he was anxious to find out what the situation was on

(Testimony of Eivind Anderson.)

this contract at Fort Lewis, if I had secured an award of the contract, or if I had any information whether I was going to get it. I told him that I had not at that time been informed as to the award of the contract. In fact, I had no information whether they were going to award it or not, and I told him in that telephone conversation that I had—I was arranging to take a trip to Washington to follow it up there,—I thought that might be a good procedure in order to be right on the ground to find out what the government was going to do.

Q. That is customary in matters?

A. Well it was very customary at that time. It seemed like all contractors went to Washington to get contracts.

Q. All right, Mr. Anderson, what did Mr. Rushlight say on the telephone?

A. He said he had—he was going back east himself on business and would probably see me at the airport at Spokane when I arrived there,—he wanted to talk to me, and of course I—the conversation ended there, you know, at that point.

Q. All right, you met him at Spokane?

A. Yes, I did.

Q. What did he say?

A. He—I stepped off the plane when it arrived there for a few minutes, and I stepped into the airport there and I met Rushlight, together with his man Hall who he introduced to me as his secretary, and explained that [290] he had sort of changed his mind about going east himself and decided to

(Testimony of Eivind Anderson.)

send his secretary back to Washington ahead of himself. He also was going east, but it would take him a few days to clean up his business around there and would likely meet us down in Washington.

He further explained in this connection that Mr. Hall could achieve a great deal if there was any difficulty in getting this job, through Mr. Holman, the Oregon senator, as he explained Mr. Hall was Holman's campaign manager and had a lot of influence with the Senator. At that point I stated to the man that as far as I was concerned I did not think I needed any support or anything of that type. I was pretty well acquainted down in Washington, and any support that I needed in that respect from a Congressman or senator, I was a close friend of Congressman Coffee and he would be willing to give any assistance in that respect that I necessarily needed. They explained that of course they were going back any way, and he already had his ticket there and he was going on this plane, and anything that he could do along those lines that they talked of there, he would be glad to do.

Q. Was anything said, Mr. Anderson, at that point—had you any agreement with them about giving them a contract?

A. Positively not. It had not even been discussed or talked of, and of course there wouldn't be any object for me to award a contract or sub-contract for plumbing and heating or any other branches of a contract which I had not yet re-

(Testimony of Eivind Anderson.)

ceived. That of course would not be a logical thing to do in any respect. [291]

Q. The bid had several alternatives that the government could accept, did it not?

A. Yes, I didn't even know if they had definitely promised that I was the successful bidder. I wouldn't even know how they would divide this or finally award the contract on it and what plumbing it would require.

Q. All right. Now then, Mr. Anderson, was anything said about sharing the expenses of Mr. Hall?

A. Positively not. They explained that they had already made this arrangement for themselves on their own business, and they had——

Q. When you got to Washington, where did you stay?

A. We got into Washington I am quite certain on Sunday morning—Sunday morning there, and he took a taxi and drove to town and inquired about hotels and the town was pretty crowded. We got a temporary room—I think it was the Hotel Mayflower for over the day or a few hours there until we could find a place to—we got a room as I recall it, in the Hamilton Hotel, finally.

Q. All right, and you stayed there until?

A. I stayed there until I left Washington.

Q. All right. Now then, you received word then finally, did you, that the contract was to be awarded to you? A. Yes, I did.

(Testimony of Eivind Anderson.)

Q. And did you contact Congressman Coffee's office when you were there?

A. Oh, yes, I contacted John Coffee many times.

Q. And he took you to the various places that—

Mr. Lycette: Let him do the testifying, counsel. [292]

A. Well, I don't think Congressman Coffee personally went to any trouble in taking me to any place. I recall that his secretary, he was along with me down there to the War Department where he introduced me to those awarding officers in the constructing quartermaster's department.

Q. Congressman Coffee made the appointments, did he?

A. Oh, yes, he made the appointments.

Q. Mr. Anderson, when you left Washington I think it was testified that you paid the hotel bill. Will you explain the circumstances?

A. Well, when that was mentioned here I believe that was right, I probably paid the hotel bill there, or it was a circumstance there that we got this room or rooms. Whether it was two or one, they were together, and I think they were billed on one billing. When I got the information that I wanted in Washington I decided immediately to take a plane for Boston to see my son and arranged for him to come west, so naturally I wanted to clear out of the hotel and pay the hotel bill, I went up to the counter and asked for the bill and they handed me the bill. Well, I didn't see Mr. Hall right there at the time and I paid the bill, so that there wouldn't

(Testimony of Eivind Anderson.)

be any question about anybody coming after me, and I took the plane out immediately and went to Boston.

Q. Mr. Hall did not leave with you or return to the Coast with you?

A. No, he explained that he intended to stay there a few more days until he met with Mr. Rushlight that was coming in. He had a telephone call from him that he was coming [293] in.

Q. Then you went to Boston and did you return to Tacoma? A. Yes, I did.

Q. When did you get to Tacoma then, approximately?

A. Oh, I do not just exactly recall the day, but I am sure it was around the 25th of April, and that about that time.

Q. I will ask you, Mr. Anderson—all right, Mr. Anderson, while you were at Washington will you state to the Court whether any question arose as to the revision in the boiler house?

A. Well I was advised that the delay in awarding this contract was partly by reason that they had conceded to revise the heating plant and the heating system for it, and they advised me that there would be——

Mr. Lycette: I am going to object to that.

Mr. Peterson: That is sufficient.

Mr. Lycette: As Hearsay.

The Court: I think it is.

Mr. Lycette: Move to strike his answer.

(Testimony of Eivind Anderson.)

Q. All right, then, Mr. Anderson, when you returned to Tacoma, then, when did you see Mr. Rushlight, or what happened in Tacoma when you got here?

A. Well the first thing when I came in there was a call for me to contact the constructing quartermaster at Fort Lewis which I did and he informed me that they were going to revise the heating plant and asked me to come out and get the information so I could give him a price on that revision.

Q. And I will ask you then, Mr. Anderson, if the government [294] furnished any plans for making up the revision?

A. Yes, they furnished several drawings there that covered that work.

Q. Showing you Plaintiff's Exhibit 16, Mr. Anderson, will you examine those and state what these are?

A. That is the drawings entitled "Boiler house, type H.B.H. 16," and it comprises the plans that the government furnished for that purpose of revising the original heating plant.

Q. Mr. Anderson, will you take a look at Government's Exhibit 3, which appears to be a letter from the quartermaster at Fort Lewis. When is that dated? A. April 26th, 1941.

Q. And with reference to revised heating drawings, what plans does that refer to? Will you give the number of them?

A. That refers to 700—1517.1, 700—1518—par-

(Testimony of Eivind Anderson.)

don me, I overlooked one of the drawing here. It takes in 700—1517, and then 1517.1, 1518, 1519, 1520, 1521, and 700—243.

Q. Now, Mr. Anderson, that is the letter which plaintiff has introduced in evidence here as Plaintiff's Exhibit 3, and that is what calls for the plans for the revised heating system?

A. Those are the plans right here.

Q. Are they all numbered in those government—

A. All of those plans correspond with the plans called for in this request for this proposal here.

Mr. Peterson: Will you hand me those plans, there? [295]

Q. Showing you, Mr. Anderson — now, then, Plaintiff's Exhibit 16, all these drawing then were prepared by the government?

A. Yes, they were prepared during that time of the request for this proposal.

Q. All right.

A. In fact, they were prepared after I got that letter.

Mr. Lycette: Did you say "after"?

A. After, yes.

Q. After he got this letter?

A. I am sure of that, because they were working on the plans at the time I was there.

Q. And Mr.—and they had been identified by the government, had they not, by numbers?

A. Oh, yes. Yes, they were all identified by those numbers.

(Testimony of Eivind Anderson.)

Q. All right now, Mr. Anderson, I will show you Plaintiff's Exhibit 15, which are these subs, and ask you, Mr. Anderson, when they were furnished you?

A. They were furnished at the same time. Of course, as I recall, it connects up with that particular thing, so they must have been furnished at that time.

Q. Counsel asked you I think the other day, if you were acquainted with M.E. subs, and I think you told him at the time you did not know anything about them, or were not aware of them?

A. It was not just on my mind. It was all washed out on my memory. I can explain of course if you will let me have that original there. exhibit. I can explain why that was. You will note that the second or third paragraph in this latter says: "No change will be made in the heating [296] distribution system except such modifications described in pages M. E. sub to M. E. 14, sub, and as may be necessary for connections to the heating plant."

Q. Now, Mr. Anderson, **this**—

A. (Interrupting) I want to explain now, Mr. Peterson.

Q. Just explain what purpose that M. E. sub served?

A. This M. E. sub simply concerns itself about this boiler revision, which is indicated on this drawing here. That is the entire thing that this is concerned about, and the boiler purchase, the type of boilers that the government would accept under this

(Testimony of Eivind Anderson.)

revision bid that they called for here. Outside of that, there is nothing in this specification that ties it in any other part of the job.

Q. Mr. Anderson, will you tell the Court whether or not that M. E. sub is a substitute for the M. E. Section of the general specification which I think is marked here as Plaintiff's Exhibit No. 2?

Mr. Lycette: Just a minute, I will object to that on the ground the instruments speak for themselves.

Q. Just point out, Mr. Anderson, if you will, then, whether this sub displaced the M. E. under the general specifications, which is Government's Exhibit No. 2?

A. Positively not, that would be simply a ridiculous interpretation. If it did, of course this project would never have been completed, inasmuch as that the M. E. in this complete specification there concerns itself with the distribution of the steam that is produced by those boilers that is furnished to the various heating units in the project on the other end of the line. There would be no connecting link between the two. The heating itself [297] in the building would be useless if that was eliminated.

The Court: I think I understand. Maybe I am in error on that, this M. E. sub just merely was a modification of the broad general outline of all of this heating and plumbing?

A. Just heating—the boilers.

The Court: It modified it to that extent?

A. That is all it did. It requires a higher pres-

(Testimony of Eivind Anderson.)

sure boiler to be used, instead of the low pressure boiler which the M.E. in this specification——

Q. The additional work under the original M. E. over and above this sub, would amount to approximately how much in money?

A. Oh, about fifty or sixty thousand dollars.

Q. Wholly additional to what was in the M. E. sub?

A. Oh, certainly.

Q. Now, then, Mr. Anderson, when did you first contact Mr. Rushlight, now, with reference to this revision work of the boiler house, next?

A. The next I heard from Rushlight after I saw him in Spokane——

Q. Washington.

A. In Spokane, Washington, was after I returned. He called me on the telephone, oh, several days after I had come back here. I was working on this—getting out these figures for the constructing quartermaster and he called me on the phone and said that he was advised that there was going to be a revision or a change in the heating plant out there at Fort Lewis, and that he had been at Fort Lewis, they had called him there for a consultation, he explained, to give him some idea—to give them some [298] idea as to what the price on this would be, a reasonable figure; that he had made a breakdown of those items that resolved itself into these heating equipment changes, and I could get that from him which might assist me in getting out my figures.

Q. Mr. Anderson, will you refer to the second

(Testimony of Eivind Anderson.)

page on Plaintiff's Exhibit No. 4, wherein it is referred that in making the estimates you consulted with Mr. Drummond. Will you read—

A. You want me to read it?

Q. Just what does that say there?

A. "We propose to make the necessary revisions in the boiler plant for the four hundred bed hospital group located at Fort Lewis in accordance with revised drawings and specifications submitted by the constructing quartermaster for the sum of \$12,118.47. This amount does not include concrete work for boiler foundations and air tunnels under boilers. For your information we have estimated the concrete work required for the concrete foundation and stoker installations to be approximately \$1800.00 for the two boilers. In accordance with the request of Mr. Drummond, we are submitting below a detailed breakdown showing in detail how the amount of the proposal has been arrived at."

Q. Who is Mr. Drummond?

A. Mr. Drummond was the mechanical engineer in charge at Fort Lewis for the constructing quartermaster.

Q. All right now, Mr. Anderson, where did you get those figures, from Mr. Rushlight, where did you—

A. As I recall now, Mr. Rushlight after he made the telephone [299] call I went down to the hotel where he asked me to come.

Q. Where?

A. Winthrop Hotel, and he handed me these

(Testimony of Eivind Anderson.)

figures here. He had some discussion there, or suggestions about getting in a bid to the constructing quartermaster right away on this matter, and I think that in that intercourse we decided to write up a letter of the complete bid, including all the other work that would be involved in a like structure and building, and so forth, and so on.

Q. All right now, then, Mr. Anderson, just retain that Exhibit 4, Mr. Anderson. What did Mr. Rushlight say to you when those figures were made up, as to whether or not that would be the actual cost of them?

A. Well, he explained that he had estimated on a safe basis, as far as this thing, and if I kept my price down on the general construction and left those figures that he had shown here, he thought that I would still get the job.

Q. In other words, the revised—you had the revision called for and additional work to what he submitted to you, did it?

A. Yes, it shows the revised setup and the original setup, and the price is broken down on each item, and then the difference in the total. It sets up a net difference of \$10,537.90, and he adds an overhead on profit of \$1680.57 making this total price of \$12,118.47.

Q. Now, then, Mr. Anderson, you later, on May 6th, put in a bid to the government, did you?

A. Yes, I did. That is the bid I put in to the government.

(Testimony of Eivind Anderson.)

Q. Did you use Mr. Rushlight's figures?

A. No, I did not use his figures, as is shown here. I had [300] of course, I had figures on this thing from the boiler people showing what this change will actually involve in price, and that of course gave me a cross section of what the thing should actually be worth.

Q. You calculated it yourself it would be worth how much? A. The change including the——

Q. Boilers. A. The whole change?

Q. No, just the boilers.

A. Just the boilers, I think I put that in the \$12,000.00, including the foundations and all this other work that goes with it.

Q. Mr. Rushlight did not include the foundations at all?

A. No, he says he has not included foundations in this.

Q. I will ask you, Mr. Anderson, in putting in your revised bid, whether that included work other than that what Rushlight was to do?

A. Oh, yes, that includes all the work that is shown on those drawings here that we just looked at.

Q. When you adopted the increased figures suggested by Mr. Rushlight, I will ask you whether or not that was deducted from any of your other items?

A. Now, I can't quite follow you, now.

Q. Well, your total bid for the revised work was how much, approximately?

A. Around \$23,000.00.

(Testimony of Eivind Anderson.)

Q. All right. Now, then, on the matter of the boilers, you figured that would come to how much actual cost if you did the work?

A. The boilers, outside of the foundations there, I think [301] we figured about \$10,500.00. I think I allowed \$1500.00 for that foundation item.

Q. All right, how much did it actually—how much did it cost to you, did you have an independent figure on the boiler?

A. Yes, I did have an independent figure on the boilers.

Q. How much did that come to?

A. As I recall, \$6,200.00.

Q. You figured that the actual cost in the changes in the boiler revision would be around six or seven thousand dollars?

A. Not over seven thousand.

Mr. Lycette: Just a minute, Counsel, I will object to your testifying. He is testifying a little different himself.

Q. Just explain, Mr. Anderson.

A. That is the figures as I recall it after I checked it with the boiler people, what that actual change would be in that heating plant itself, should be \$6,270.00, I think.

The Court: Well, the original plans that you bid on called for boilers also, did it not?

A. Oh, yes.

The Court: How many boilers?

A. Three.

(Testimony of Eivind Anderson.)

The Court: And what would they have cost you?

A. The boilers I think would have cost about \$15,000.00.

The Court: And the revised plan permitted you to substitute or required you to substitute two high pressure boilers? [302]

A. That is right.

The Court: And they cost you—

A. They cost \$16,000.00.

The Court: So they offset each other?

A. They would offset each other, certainly.

Q. And you figured the addition of the revision over the old figures to be how much, according to your own calculation?

A. My bid to the government?

Q. Yes.

A. That would be \$10,500.00.

Q. Now, then, Mr. Anderson, I will ask you whether or not in adopting that figure with the government, whether you decreased the items—some of the other items of your work, outside of the plumbing?

Mr. Lycette: Just a minute, I am going to object to that on the ground that it is purely a mental process of his, which so far, there has been no indication it was in any way disclosed to Mr. Rushlight, or claimed to be, so that, therefore, is not a proper matter of testimony here; that the bid itself to the government is in writing, and discloses just exactly what it is.

(Testimony of Eivind Anderson.)

The Court: The objection will be overruled. He will be allowed to answer.

Q. Mr. Rushlight—Mr. Anderson, what did Mr. Rushlight tell you if you put in a figure of \$10,000.00 to the government, what did he say that would allow you to do on the other items?

A. He said that would allow me to cut my other items down. That would show the government the combined price of the bid was beyond doubt the lowest bid that they could expect [303] to get.

Q. And I will ask you if that is the reason why you submitted this figure to the government?

A. Oh, I don't know whether that really had a great deal of bearing on this addition to the government, in submitting this bid. It might have encouraged one way or another a few hundred dollars I can't testify to that.

Mr. Peterson: That is a convenient stopping place, Your Honor.

The Court: Yes, I want to ask a question in this connection while we are on that.

Your original bid that you made, and that which was finally accepted, was a bid for \$936,517.00?

A. That is the bid,

The Court: Now, independent of other modifications and changes that might have come into being in the course of the progress of the work, taking this item of approximately \$23,000.00, would that be added to the \$936,000.00?

A. Oh, yes, that would be in addition to that figure.

(Testimony of Eivind Anderson.)

The Court: Then of course, there are numerous other items not in controversy. I assume there would be in a contract of this size.

A. Following the award of the contract there was other changes.

The Court: That is what I wanted to get, so up to the time that you say you had accepted this modification in reference to the heating plant, you still had not executed a contract with the government? [304]

A. No, I had not. They held up—they explained that they would not make the award.

The Court: But, you had their assurance you were going to be awarded the principal contract?

A. It was explained that it would somewhat depend on my supplementary bid. If it was too high they might give it to somebody else.

The Court: The court will adjourn, so far as this case is concerned, until 2:00 o'clock p.m.

(Recess.)

2:00 o'clock p. m.

Direct Examination (resumed)

By Mr. Peterson:

Q. Mr. Anderson, I believe when we adjourned, we got to April 30th, 1941, and showing you Plaintiff's Exhibit No. 4, which contains a bid to the government purportedly of \$25,402.38, will you tell the Court where that was made up and the circumstances and whether it was used?

(Testimony of Eivind Anderson.)

A. It is a copy of a letter, involving this bid to the government on April 30th, and it was made up at the Winthrop Hotel, in connection with this bidding, and has a copy of an estimate given by Rushlight on the revision of the boiler plant.

Q. What was that figure, Mr. Anderson?

A. The figure shows it to be \$25,402.38.

Q. Was that actually submitted to the government?

A. No, that was not submitted to the government at all. [305]

Q. Why wasn't it?

A. I recognized later on, after this was made, that it was hastily made, and I did not have enough information really to feel certain that this was the proper bid to submit, and I did not submit it. I threw it away.

Q. Showing you—now, then, we get to May 6th. Just hold both of those exhibits. On May 6th, you had then completed your offer to the government?

A. At that time I had completed my survey over the plans, the revised plans, and all the matters that went into this item of revised boiler plant, and I found at that time that I could do the job for \$23,124.00 and I submitted the figures to the government on May the 6th.

Q. Now, then, Mr. Anderson, the letter on May 6th is what exhibit? A. Exhibit 5.

Q. All right now, Mr. Anderson, on May 6th when that—where was that exhibit prepared, or do you know?

(Testimony of Eivind Anderson.)

A. That was prepared at my house.

Q. All right, did you see Mr. Rushlight on May 6th? A. Yes, I did.

Q. Where?

A. Rushlight drove with me to Fort Lewis, purposely to deliver this bid.

Q. That is the bid of May 6th? A. Yes.

Q. Mr. Rushlight, where had he been staying?

A. He was staying at the Winthrop Hotel during those days, as I understand. He called me prior to the date I had this bid all completed. [306]

Q. On May 6th, then, Mr. Anderson, up to the time you and Mr. Rushlight went to—or did he accompany you to Fort Lewis?

A. Yes, he asked to go with me out there. He thought he might be of assistance if anything came up on the question of this mechanical equipment matter.

Q. All right, what happened at Fort Lewis in the presence of Mr. Rushlight?

A. The constructing quartermaster looked over my proposal and said, "This is all right, now, Mr. Anderson, I will award you the contract and give you instructions to proceed."

Q. And he approved the revisions and the general contract on the same date?

A. Yes, he did.

Q. All right, then, what did you and Rushlight do?

A. Well, we started back to town again.

(Testimony of Eivind Anderson.)

Q. I will ask you now, Mr. Anderson, up to this time—up to May 6th, 1941, had you had any oral or written bid from Mr. Rushlight on the entire job?

A. No, I am positive that I never had any fixed bid from him, either oral or in writing.

Q. All right, what conversation did you have with him returning from Fort Lewis to Tacoma?

A. Well, at that time, that was the first time that I could say that I had a contract, that I needed to buy anything for, or sublet any work for, so I opened up on Mr. Rushlight, stating that "Now I am ready to go to work and if you have any offers to submit on this heating and plumbing item, I better get your written proposal." [307]

Q. All right, what did you—

A. (Continuing): And we of course talked a little forth and back about the various things there, and I finally made him an offer that I would be willing to allow him \$293,000.00 for doing all of the plumbing and heating work that was involved in this contract.

Q. And the revisions had been agreed upon then? A. Oh, yes.

Mr. Lycette: Just a minute, I am going to object to this on the grounds it is all testimony attempting to change, alter and to vary the terms of a written contract, the written contract being evidenced by the writing of May 15th which is in evidence here. I move his last answer be stricken, when I started my objection.

(Testimony of Eivind Anderson.)

The Court: The objection will be overruled.

Q. Mr. Anderson—

The Court: Pardon me, what exhibit is that, Mr. Lycette?

Mr. Peterson: That is Exhibit—

The Court: May 16th contract.

Mr. Lycette: May 15th.

The Court: May 15th.

Mr. Lycette: That is the written sub-contract, Your Honor.

The Court: But what exhibit number is it?

Mr. Evenson: Seven.

The Court: Number Seven?

Mr. Lycette: Seven it is.

The Court: Will you let me see it. All right, [308] proceed, Mr. Peterson.

Q. Now, then, Mr. Anderson, in response to your figure of—on May 6th of \$293,000.00 what did Mr. Rushlight say?

Mr. Lycette: May it be understood, Your Honor please, that on this testimony that is now being given, which I conceive attempts to contradict the contract, that I may have that objection without repeating it?

The Court: Yes, you may.

Mr. Lycette (Continuing): Continually here.

A. He said that he had no other work to speak of at that time, and he had his organization intact and was ready to go, and he would take the job at that price.

Q. And that was on what date?

(Testimony of Eivind Anderson.)

A. That was on May 6th.

Q. All right, I will ask you then, on that date, what was said if anything with reference to ordering the boilers from Mr. Early, and the Early Company?

A. He said he would order the boilers right then on that day, and when we got into town he stepped off at the Winthrop Hotel and called me later in the evening that he had placed an order with Roy T. Early for the boilers and that he would bring this contract up to my house and get my signature on it, and I could charge the amount of those boilers against his account, of the contract.

Q. I will ask you whether or not Mr. Rushlight in that conversation explained to you why you should sign the contract instead of himself?

A. He explained that he would not be able to buy the boilers from Mr. Early on account of being out of his jurisdiction, for his agency. [309]

Q. Mr. Anderson, showing you now Plaintiff's Exhibit 17, I will ask you if pursuant to that order, you signed a contract with Early?

A. I did. I signed it on the 7th of May.

Q. And were those the boilers under the revision contract, or under the old one?

A. No, that is the boilers for the revision contract. It specifically specifies the type and all the accessories and so forth that goes into that particular job. That is practically a specification in itself.

(Testimony of Eivind Anderson.)

Q. Mr. Anderson, I believe you stated on May 6th you told Mr. Rushlight to get in a written proposal? A. Yes, I did.

Q. All right, what did he say in response to that? A. He said he would.

Q. Did you see him between May 6th—or when after May 6th, 1941, did you see him again?

A. On May the 9th, the evening.

Q. On May the 9th of what year?

A. 1941.

Q. And where? A. At my home.

Q. And who was present at that meeting?

A. My son was present, myself, Mr. Rushlight, Mr. Hall, his secretary.

Q. Mr. Hall. Showing you now—oh, I will ask you—just a minute, Mr. Anderson. At that time did Mr. Rushlight submit any written proposal?

A. Yes, he did.

Q. Showing you Plaintiff's Exhibit No. 8, I will ask you [310] whether or not that is the proposal?

A. That is right, that is the proposal.

Q. Huh?

A. Yes, that is the proposal.

Q. That is the written proposal. Mr. Anderson, where was that proposal submitted to you?

A. It was submitted to me at my home here in Tacoma.

Q. The figure in writing of two hundred and ninety-three thousand dollars appears in writing there, does it not? A. Yes, it does.

(Testimony of Eivind Anderson.)

Q. I will ask you when that was inserted, if you know?

A. I do not know. It was inserted when I got the proposal, when he delivered it to me.

Q. And was any changes made on that proposal? A. None at all.

Q. Huh? A. None at all that I know of.

Q. What about the date?

A. The date was, yes. The date was marked there at that time, if that is what you have——

Q. What was the date on the original?

A. The original date is April the 3rd, 1941.

Q. Yes.

A. And the other date is May 9, 1941.

Q. How did it come to be changed?

A. It was pointed out I believe by my son that the date of April third appeared on this, whereas we were handed it on May the 9th, and at that time Mr. Rushlight pointed out that it was marked up here in the upper corner "revised", and he stated that naturally would bring it [311] to date. At that time I said "You better put on the date as well" and then he wrote in the date of May the 9th.

Q. Mr. Anderson, at that time was there any discussion as to the price?

A. None at all, that was already established and it coincided with what we had talked about before, and this proposal bore that figure out so there was no consultation about the price.

Q. And Mr. Anderson, was there—what was the

(Testimony of Eivind Anderson.)

—was there any discussion about anything that evening?

A. Yes, there was some discussion about whether they should furnish a bond or not—a performance bond.

Q. Yes?

A. And I pointed out to him that it would be necessary for him to furnish a performance bond on that large contract; that it was something that I conceded to be the way of doing business, and of course they tried to sell me on the idea that it was not necessary; that they were big enough firm to be secure within themselves, and with that kind of a background it was just throwing money away, and there was some discussion forth and back about that. I finally explained to him that as far as their proposal there, was okeh, and I would give him a letter the next day accepting it in writing and give him a certain date to produce this surety bond and the contract would be signed.

Q. Mr. Hall took a part in that conversation, did he.

A. Yes, he was very active in that conversation.

Q. And I am showing you Plaintiff's Exhibit 9, Mr. Anderson, [312] I will ask you whether you sent that letter to him in response to that conference?

A. I did. I sent this letter the following day—put it in the mail.

Q. And you were requesting a bond, were you?

A. Yes, I was requesting a bond. It was sub-

(Testimony of Eivind Anderson.)

mitted subject to satisfactory surety performance bond, and to submit a breakdown of his proposal showing individual parts of the work and so forth, and so on.

Q. Mr. Anderson, what was said at that meeting about preparing a contract—the regular form of sub-contract?

A. There was nothing said as I recall, on that meeting about preparing a contract, except as I have stated. The discussion was whether this proposal should involve them—their surety bond or the price of it. They said they were willing to deliver the bond but I should pay the price for the bond and I did not accept that proposition.

Q. And all right, that was on May the 10th—what happened Mr. Anderson between May the 10th and May the 15th, then?

A. On or about May the 15th, Rushlight had not as yet furnished this surety bond. I think that kind of brought him up to the time limitation that I set that he had to produce, otherwise the work would go to somebody else and he did come in, however, late in the evening of May the 15th with his surety man. They brought a bond.

Q. What time did they arrive?

A. Oh, I would say around—it might be close to 10:00 o'clock.

Q. That was on the last date, was it? [313]

A. It was.

Q. And I will ask you, Mr. Anderson, if at that time—where was that signed?

(Testimony of Eivind Anderson.)

A. That was at my home in Tacoma, here.

Q. In Tacoma, and at that time, Mr. Rushlight signed them, Plaintiff's Exhibit No. 7?

A. That is right.

Q. At that time, Mr. Anderson, had you established your—had you commenced performing the contract at Fort Lewis?

A. Yes, I had. I was a very busy man there for a while.

Q. And it was testified by Mr. Rushlight, Mr. Anderson, I think, you never questioned this twelve thousand dollar item. I will ask you, Mr. Anderson, whether you ever agreed with Mr. Rushlight to pay him twelve thousands dollars or any other sum for any of this revision work?

A. No, there certainly was no agreement made to that effect. The price that was established, was based upon the understanding that it took in all of the work, including the revision work in the boiler house.

Mr. Lycette: I now move to strike the witness's answer, because the contract between the parties is in writing and his statement concerning what the agreement was cannot override the written contract, and I move to strike it.

Mr. Peterson: All right.

The Court: The motion will be denied and exception allowed.

Q. Mr. Anderson, did you explain to Mr. Rushlight—oh, just a minute.

(Testimony of Eivind Anderson.)

I will ask you, Mr. Anderson, whether you had any [314] conversation with Mr. Rushlight, either during the progress of the work or at Fort Lewis, as to whether or not this was a revision item, or whether you should pay for it?

A. I recall Mr. Rushlight brought it up why I had not—why I did not give him an order or a contract, what he called it, for this boiler house equipment, and I said that he certainly could not expect any more contracts than he had on that score, because he was only furnishing the boilers that was agreed on to be used, and no other work had been required from him. He said then, I believe he threatened then that if he was not given an order or a contract that he would quit the job, and I said to him “If you do, of course the bonding company will naturally have to finish it up.”

Q. And Mr. Anderson, did you explain to Mr. Rushlight—I don't know whether I asked you how you arrived at the figure of two ninety-three?

A. Oh, I don't recall now. Of course we had some talk about what the prices were that were submitted at the time the contract was originally figured, and the prices actually involved in those boilers, and I am quite sure that I pointed out to him that the actual difference in boilers, the new and the old, the work involved there would not exceed \$7,000.00, and I think that is what actually brought that figure up to two ninety-three. I had a price in my contract for about two hundred and

(Testimony of Eivind Anderson.)

eighty-six thousand. Adding seven thousand to it would of course make that figure up to ninety-three. [315]

E. P. ANTONOVICH

produced as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Lycette:

Q. Your name is E. P. Antonovich?

A. That is right.

Mr. Lycette: Speak just a little louder.

A. Yes.

Q. In 1941 you were a lieutenant colonel in the Quartermaster Corps, were you not?

A. I was.

Q. And you were stationed at Fort Lewis, were you not? A. I was.

Q. You were designated as the Constructing Quartermaster, were you not?

A. I was, yes.

Q. And as such had charge of the construction of this four hundred bed hospital with the thirty-six miscellaneous buildings that were constructed by Eivind Anderson?

A. That is correct.

Q. Colonel, how long—you are now retired, are you not? A. Yes.

(Testimony of E. P. Antonovich.)

Q. You retired as a full colonel, did you not?

A. That is correct.

Q. How long had you been in the army?

A. 26 years.

Q. And during that time, what—just very briefly, what type of work did you do? [397]

A. Principally building army posts and stations.

Q. Prior to going into the army, your profession was what?

A. Architectural engineer.

Q. You recall, of course, the construction of this—the carrying out of this particular contract, I take it? A. I do. [398]

Q. Colonel, the evidence in this case shows, to refresh your recollection, that this contract was bid on—the bids were opened on April 8th, 1941, and the contract was subsequently awarded to Mr. Anderson by a letter, or his notification came by letter which bore date of May 6th, 1941, which I think he received on May 8th, 1941. Now, I want to ask you, Colonel, if it is not a fact that after the bids were opened Mr. Anderson was shown to be the low bidder on the job—do you recall?

A. Yes, that is correct.

Q. Now I will—would like to ask you now if, after it appeared that Mr. Anderson was the low bidder, if it is not true that your department, you and your assistants, as well as the zone engineer located in San Francisco, did not recommend that

(Testimony of E. P. Antonovich.)

the contract be not awarded to Mr. Anderson but be awarded to the second bidder?

Mr. Peterson: Just a moment. I move to object to that as being wholly irrelevant to, and incompetent—calling for a conclusion. It is leading, and this office would have nothing to say about the awarding of this contract, which was apparently later developed.

The Court: Objection will be overruled and an exception allowed, and I might state to you, Mr. Peterson, so you will understand the Court's position, the Court holds it material because of the sharp conflict in the testimony as to why this trip was made to Washington.

Mr. Peterson: All right.

A. Yes, it was. It was recommended that the contract be not awarded to Eivind Anderson.

Q. And I will ask you then, Colonel, if it was not after [402] instructions came, nearly a month later, from Washington, D. C., that it was awarded to Mr. Anderson?

A. That is correct, to the best of my recollection.

Q. Now, don't answer this question until an opportunity is given to object—will you state what the reasons were that you recommended against the awarding of this contract to Mr. Anderson on his low bid?

Mr. Peterson: Your Honor, please——

The Court: I think I will sustain the objection. [403]

(Testimony of E. P. Antonovich.)

Q. Colonel, I will show to you Plaintiff's Exhibit 3 which is a letter dated April 26th, in which you call attention to certain substitute specifications. I will ask you to read the letter and then, after reading your letter and looking at those substitute specifications, I will ask you if those specifications were issued under your direction for the purpose of making a change in the boiler house?

Mr. Peterson: We admit that.

Mr. Lycette: Mr. Anderson denied it the very first day.

The Court: He may answer.

Mr. Peterson: There is no dispute on that.

A. Yes, this is the specifications referred to in this letter.

Mr. Lycette: Thank you very much. That is all.

The Court: Well now, at the time the original bids were called for and at the time of the opening of the bids on the contract proper, this modification was not a part of it, was it? [405]

A. No, it was not, sir.

The Court: When did it come into being, if you recall, in reference to the awarding of the contract?

A. Oh, it was some time subsequent thereto. I can tell by the date of that letter.

Mr. Lycette: I think it would be of assistance (handing letter to the witness).

A. This is April 26th. Can you tell me when the contract was awarded?

The Court: On the 8th of May.

(Testimony of E. P. Antonovich.)

Mr. Peterson: Sixth.

The Court: Or on the 6th of May.

Mr. Peterson: We got it in August.

The Court: But the bids were opened in April.

Mr. Peterson: April the 8th.

Mr. Lycette: The bids were opened on—submitted on April 8th.

A. We then asked for this change. I might state in passing, Your Honor, that these plans were prepared in the heat of a rush during the war period, and the ultimate object was to get a hospital finished. We had anticipated an epidemic and wanted to be ready for it. Every effort was put in to rush the job and as a result some discrepancies arose and subsequently had to be corrected or included, and this was one of them.

The Court: They were not then—it was not possible that they could have been in contemplation of any of the parties interested in either the bids or the situation subsequent to the bids and prior to the time that the bids were opened? Do I make myself clear? Anyone who would [406] bid on this job, based upon blue prints, plans and specifications, would not have had this modification in mind?

A. No, it was subsequent.

The Court: That is all. That is what I wanted to make perfectly clear.

A. It was subsequent to the original plans and specifications.

The Court: But apparently it came into existence prior to the actual formal awarding of the contract.

(Testimony of E. P. Antonovich.)

A. Yes, probably so, we did that. Ordinarily the contract would have been awarded in twenty-four hours, but for some reason it was held up, and during that time this change occurred that we desired to correct.

The Court: Well, it was held up bluntly and directly because you did not give it your approval to begin with?

A. That is correct.

The Court: And it was some one of your superiors who finally directed its approval?

A. That is correct.

The Court: And that was the result of orders that came from Washington, from the War Department, the Quartermaster's division in Washington?

A. The final approval?

The Court: Yes.

A. The final approval was awarded—usually we would telephone in a proposal, say such and such is low man, request an approval of award of contract and on that same telephone conversation the approval would be given. That is the way it was done, but in this case it was necessary [407] to send all the papers to the Quartermaster General.

The Court: That is all. [408]

Cross Examination

Q. Colonel, so as to get—I think counsel has made a little confusion in the matter. Showing you—Colonel, just a minute. Colonel, do you recall the approval of these revisions for the boiler house were approved on May 6, at the time that the main contract was approved?

(Testimony of E. P. Antonovich.)

A. I think that is correct.

Q. That is correct. Showing you Plaintiff's Exhibit 6, that is your letter, Colonel?

A. Yes, this is my letter.

Q. And that shows that you orally approved of the revision on May 6th? A. That is correct.

Q. And referring to——

Mr. Peterson: That is introduced in evidence, Your Honor. [413]

Q. And referring to a letter contained in Plaintiff's Exhibit 1 which is attached to the main contract, that shows also on May 6th that he was directed to proceed under the main contract, on the same date? A. Yes, that is correct.

Q. By referring to the certificate attached to Plaintiff's Exhibit 1, which is the contract, Eivind Anderson's signature on the main contract did not occur until May 29, 1941, is that so? A. Yes.

Q. That is right? A. That is correct.

Q. Do you know the date, Colonel, when the contract was actually delivered by the government to Mr. Anderson?

A. It was probably some time subsequent to the date of the award.

Q. Maybe without—by referring to that letter, Colonel, can you tell the Court when the contract was actually delivered to Mr. Anderson, the main contract?

A. According to this it was August the 11th.

Mr. Lyette: Give the year.

A. That was 1941.

(Testimony of E. P. Antonovich.)

Mr. Peterson: 1941.

Q. But he was authorized to proceed as under May 6th?

A. That is right. That letter of authority is, in substance has the value of a contract.

Q. Yes, that is all right, and when the authority given, that is you say, the contract?

A. Yes. [414]

Q. That is what you intended to do when you wrote to Mr. Anderson your A-23?

Mr. Lycette: Just a minute, I will object. The question has been asked about ten times and the witness has answered that same question.

The Court: Proceed, he answered it in the affirmative.

Q. That is what you intended?

A. This letter was intended first of all to get the job done. Now the question of the thickness of metal is one of interpretation.

Q. Yes.

A. Now, according to that letter the drawing had to be followed.

Q. That is all I wanted to know. That is all I wanted to know.

The Court: And this drawing is part of the original drawings and not the modified plan or was it modified—a changed plan on the heating plant?

A. I think this is the original drawing.

Mr. Lycette: I might say, Your Honor, and I think counsel will agree with me that has nothing to do with this part of it at all.

(Testimony of E. P. Antonovich.)

Mr. Peterson: The boiler house has no effect on these whatever. I think that is all, Colonel. [421]

Redirect Examination

By Mr. Lycette:

Q. This morning counsel called your attention to the fact that under the theatre section of the specifications there was a special or separate section relating to sheet metal. That is T-H 1, or T H?

A. Yes.

Q. I say, this morning Mr. Peterson called your attention to the fact there was a specification under theatre devoted to sheet metal.

A. That is correct.

Q. And I think was endeavoring to draw the inference because the stacks were not mentioned, therefore they were not required under sheet metal. Now I will ask you—direct your attention to the introductory note to theatre found on T H 1, and ask you what that does in that respect?

A. What page is that?

The Court: What page, he asked.

Mr. Lycette: T H 1. That is in the very first part of it. I might assist you.

The Court: Yes, you may step up there.

Q. Then you will notice that Service Clubs come *net*, because I am going to ask you about that. Now, do you have my question in mind?

A. Yes.

Q. What does T H 1 provide for, first?

A. This opening paragraph under the theatre section reads as follows: Note—The following speci-

(Testimony of E. P. Antonovich.)

fication shall specifically apply to work on the theatre. Items in connection with the theatre not mentioned in this section [422] shall be construed in conformity with the main specification.

Q. Now I will ask you now, Colonel, the absence of a mention of stacks in the sheet metal part of the theatre, does that mean they are eliminated from the sheet metal, or what does it mean?

A. It means that the stacks are governed by the main portion of the specification.

Q. That would be that section 5 which you have already mentioned? A. That is correct.

Q. Now I will call your attention to the next section that begins along about a quarter of an inch in there SCS. That is the Service Club section? A. Yes.

Q. I will ask you first—call your attention to the fact that counsel mentioned—pointed out that there was a sheet metal section there which did not refer to stacks, and I will ask you if there isn't a similar provision that refers back to the main specifications and ties those in?

A. Yes, there is an identical paragraph to that I read in connection with the theatre.

Q. Now just to sum it all up, regardless of what discrepancies may appear between the plans and specifications, it is your interpretation. I understand, that those stacks came under the sheet metal work? A. That is my interpretation.

Q. And was at the time?

A. Oh, yes, no question about it. [423]

(Testimony of E. P. Antonovich.)

Mr. Lycette: Now may I have that contract that you showed to him, Mr. Anderson's own contract?

Q. It think counsel called your attention to the fact that while Mr. Anderson was advised that his contract was accepted on May 6, 1941, yet the letter actually transmitting the document, the printed document was dated August 11, 1941?

A. That is correct.

Q. That is what you testified. It is very common, is it not, that jobs will be half-way, and sometimes fully completed before the actual physical contract, aside from specifications, but the contract is signed by the government?

A. That is correct. That is usual.

Q. In other words, it takes so much time to get through the governmental offices?

A. There was a log jam in the office in Washington, and in many cases it was months after the awarding of the contract—the formal contract was executed.

Q. Now when this contract was actually—when the contract was actually prepared and came through for signature, it related only to the items which were originally bid upon and not those which came up subsequently, is that *not* correct?

Mr. Evenson: I think the document speaks for itself. I will object to the answer to that question.

A. I believe that is correct. I believe that item covering the change in the boiler plant was covered by a change order.

(Testimony of E. P. Antonovich.)

Q. One of the letters here which has been introduced under [424] your signature, which advised Mr. Anderson that the revision of the boiler—the heating plant would be accepted, contained the statement “A formal change order will follow.” Just tell the Court what a formal change order is.

A. First of all, Your Honor, speed is the essence, and we accept changes upon written proposals. These written proposals are reviewed and the cost determined. That is, we endeavor to determine that the price offered is fair. If we are satisfied that the price is fair we immediately state that “your proposal is hereby accepted. Proceed with the work and formal change order will follow,” and then in due time a change order is issued which reads briefly as follows:

“Your proposal of (such and such a date, and such and such an amount) covering certain specific work is hereby accepted and you will be allowed the additional sum states,” and that is attached to the contract and made a part thereof.

Q. Do you recall when that order—would you recall when that particular formal change order went through in this case?

A. No, I would not.

Q. Those change orders subsequently become a separate part of the contract, don't they?

A. They become a part of the contract. That is, the original contract amount is stated in all settlements and added thereto is change order A.B.C.D.

(Testimony of E. P. Antonovich.)

and E. and the total becomes the amount due the contractor.

Q. The change orders are always—and the amounts involved in them are always carried separately clear through the [425] accounting?

A. Clear through all the accounting.

Mr. Lycette: That is all.

Recross Examination

By Mr. Peterson:

Q. All of the accounting work has already been done in most instances when the change order comes through?

A. Not always, but the fact that we have authorized him, that his proposal is accepted, is all that is considered necessary to bind the government by that change order.

Q. Colonel, do you know that the main change order in this case was delivered to the government—by the government in April of 1942? That is not an unusual occurrence is it, in rendering an accounting?

A. A change order was delivered in April?

Q. Yes, the big change order in this case No. 3, came—I think it was delivered to Mr. Anderson in April of 1942. Would that be an unusual circumstance?

A. Well, it did not detrimentally affect Mr. Anderson in any way.

Q. No.

A. It may have been due to war conditions that

(Testimony of E. P. Antonovich.)

there was delay, but the government obligated itself when I put my name on that change order. That was just like a draft on the government.

Q. And that is from the time that you approved the contract?

A. I don't understand that.

Q. For instance, on May 6th——

A. Yes. [426]

Q. The obligation of the government on the revision and on the contract started from May 6th?

A. That is correct. [427]

EIVIND ANDERSON,

recalled as a witness on behalf of the Defendants, was examined further and testified as follows:

Direct Examination—(Resumed)

By Mr. Peterson:

Q. Mr. Anderson, showing you Defendants' A-26, I will ask you what that is?

A. That is a proposal bid for plumbing, heating, distribution, boiler plant, hot air furnaces and stoves in the project of the four hundred bed hospital.

Q. That is on this job? A. Yes.

Q. By whom? [433]

A. By Hasdorff, Incorporated, Portland.

Q. Under what date?

A. Under date of May 5th, 1941.

Q. You had that on May 5th, did you?

(Testimony of Eivind Anderson.)

A. I had it, I am sure I had it on May 6th.

Q. All right. I will ask you, Mr. Anderson, if before that time, I will ask you whether you had any oral bid from these people before your contract was signed?

A. Yes, I had. That is a confirmation of the oral bid I had.

Q. Was your oral bid before your bid was opened at Fort Lewis? A. Yes, it was.

Q. You showed this bid to Mr. Rushlight, and I believe that was discussed?

A. I think Mr. Rushlight saw the bid, yes, afterwards.

Mr. Lycette: I have no objection.

The Court: It will be admitted.

(Whereupon, document referred to was received in evidence and marked Defendant's Exhibit A-28.)

(Testimony of Eivind Anderson.)

DEFENDANTS' EXHIBIT No. A-28

Hastorf, Inc.

Automatic Sprinkler Systems. Ventilating. Plumbing and Heating. Phone East 5181. 735 S. E. Morrison St. Portland, Oregon.

May 5, 1941

Mr. Eivind Anderson, 517 North "I" Street, Tacoma, Washington.

Re: 400 Bed Hospital Group—Fort Lewis, Wash.

Dear Sir:

We submit below our figures covering the installation of Plumbing, Heating, Steam Distribution, Boiler Plant, Hot Air Furnaces, and Stoves, in the above project:

Basic Bid:

| | | |
|---|---------------------------------------|----------------|
| Two Hundred Eighty-Six Thousand and No/100 | Dollars | (\$286,000.00) |
| Item 2—Deduct for 29 miscellaneous buildings— | | |
| | Thirty-Three Thousand and Six Dollars | (\$ 33,006.00) |
| Item 3-A—Add Each—Eighteen Hundred Sixty-Nine | Dollars | (\$ 1,869.00) |
| 3-B—Deduct “ —Seventeen Hundred Seven | Dollars | (\$ 1,707.00) |
| 3-C—Add “ —One Hundred Fifty-Seven | Dollars | (\$ 157.00) |
| 3-D—Deduct “ —One Hundred Forty-Two | Dollars | (\$ 142.00) |
| 3-E—Add “ —Six Hundred Forty-Five | Dollars | (\$ 645.00) |
| 3-F—Deduct “ —Five Hundred Ninety-One | Dollars | (\$ 591.00) |

(Testimony of Eivind Anderson.)

| | | |
|------------|--|---------------|
| 3-G—Add | Each—Sixteen Hundred Seventy-One Dollars | (\$ 1,671.00) |
| 3-H—Deduct | “ —Fifteen Hundred Thirty-Three Dollars | (\$ 1,533.00) |
| 3-I—Add | “ —Eight Hundred Fifty-Five Dollars | (\$ 855.00) |
| 3-J—Deduct | “ —Seven Hundred Ten Dollars | (\$ 710.00) |
| 3-K—Add | “ —Twelve Thousand Three Hundred Twenty Dollars | (\$12,320.00) |
| 3-L—Deduct | “ —Eleven Thousand Five Hundred Thirteen Dollars | (\$11,513.00) |
| 3-M—Add | “ —Forty-Six and No/100 Dollars | (\$ 46.00) |
| 3-N—Deduct | “ —Thirty-Six and No/100 Dollars | (\$ 36.00) |
| 3-O—Add | “ —Eight Hundred Seventy-One and No/100 Dollars | (\$ 871.00) |
| 3-P—Deduct | “ —Eight Hundred One Dollars | (\$ 801.00) |
| 3-Q—Add | “ —Seven Thousand Six Hundred Thirty-Four Dollars.... | (\$ 7,634.00) |
| 3-R—Add | “ —Four Thousand Three Hundred Ninety-One Dollars | (\$ 4,391.00) |
| 3-S—Add | “ —Nine Thousand Nine Hundred Seventeen Dollars | (\$ 9,917.00) |

Item 4-B:

| | | |
|---|----|-------|
| 1—1¼" Std. Steel Pipe—installed per foot..... | \$ | .80 |
| 2—1½" " " " | | .85 |
| 3—2" " " " | | .90 |
| 4—2½" " " " | | 1.20 |
| 5—3" " " " | | 1.50 |
| 6—Deleted | | |
| 7—Deleted | | |
| 8—Deleted | | |
| 9—Deleted | | |
| 10—1¼" Std. Rising Stem Gate Valves, installed—each.... | | 10.60 |
| 11—1½" " " " " | | 12.60 |
| 12—2" " " " " | | 23.00 |
| 13—2½" " " " " | | 35.00 |

(Testimony of Eivind Anderson.)

| | | | |
|--------|---------------------------------|-------|--------|
| 14—1½" | Anchors—installed—each | | 5.00 |
| 15—2" | Anchors | “ “ | 5.00 |
| 16—2½" | Anchors | “ “ | 6.50 |
| 17—3" | Anchors | “ “ | 7.00 |
| 18—1½" | Expansion Joints—installed—each | | 70.00 |
| 19—2" | “ | “ “ | 76.00 |
| 20—2½" | “ | “ “ | 85.00 |
| 21—3" | “ | “ “ | 102.00 |

Sewer and water have been figured 5' out from building.

Very truly yours,

LORD and HASTORF

By H. L. HASTORF

It is agreed that this document becomes a contract between Eivind Anderson and Lord and Hastorf, contingent upon Eivind Anderson receiving award from United States Government.

.....
Signed this day of 1941

[Endorsed]: Filed Apr. 12, 1944.

Mr. Peterson: That is all.

Cross Examination

By Mr. Lycette:

Q. Mr. Anderson, when you were first called as a witness here, that was on Thursday, I believe, of last week, among other things you testified that you did not pay Mr. Hall's hotel bills in Washington, D. C. You have changed your mind, you did pay them, did you not?

A. I paid my hotel bill and there probably was

(Testimony of Eivind Anderson.)

some charges [434] on the same bill that should have been paid by Mr. Hall that I did pay.

Q. You recall when you were here on the stand on Thursday that there was shown to you Plaintiff's Exhibit 4, which is a letter dated April 30th, which was signed—purports to be signed by you and attached to it is a signed letter by Mr. Rushlight. Do you recall that you denied signing that letter?

A. No, I don't think I denied signing it. I did not say that I did sign it or did not sign it, I said I had difficulty in recognizing the letter, I believe that is the way intended to say it, if I didn't.

Q. You now admit that you signed that letter, did you not? A. I can connect it up.

Q. I now ask you if you don't admit that you signed that letter? A. I am explaining it.

Q. You can answer it "yes" or "no", and explain it later.

A. I signed the letter if you want it that way.

Q. I asked you to look at your signature on Thursday. Has your recollection of your signature changed between now and Thursday?

A. My signature isn't constant on paper.

Q. That is your signature?

A. That is my signature.

Q. No question about it at all?

A. I don't think so. I don't think there is any question about it.

Q. Now, on Thursday I asked you—I showed you a set of specifications which are Plaintiff's Ex-

(Testimony of Eivind Anderson.)

hibit 15, which [435] were the sub-specifications and you recall that you at that time denied that a set of such specifications had been put out by the government. You now admit it, do you not?

A. I don't recall that I particularly denied it. I said I had difficulty in recognizing it, but after my memory has been refreshed I recognize this now.

Q. Well, do you recall——

A. (Continuing): I seen this mechanical one, sub-section or whatever it stands for, sub, which covers boilers, the high pressure boiler which was purchased.

Q. Mr. Anderson, you testified on Thursday that you did not see those specifications, or have them until after your sub-contract with Mr. Rushlight had been entered into. Isn't it a fact now, that you had those specifications long prior to that time?

A. No, I don't say it had been long prior to that time. It must have come to attention during this negotiation of those different boilers that was bought, and of course it is possible that I did not pay a great deal of attention to those particular specifications because of the fact that the matter that is covered herein was determined by negotiation with the boiler people, and their proposal covered everything in here, and that would be applicable to that purchase of the boilers.

Q. Now, come back to this—your contract, ac-

(Testimony of Eivind Anderson.)

tual written sub-contract with Mr. Rushlight was signed on May 15th, was it not?

A. That is the date.

Q. Now, you now admit that you had these specifications, [436] Plaintiff's Exhibit 15 prior to that time?

A. I think I testified that I saw them during that interim of negotiating about those boilers.

Q. I will ask you now if you did not have those specifications on April 13th or April 30th, at the time you wrote that letter?

A. I don't believe so, I don't believe so.

Q. You say you think you saw them some time prior to May 15th, the actual date of Mr. Rushlight's contract, but you are not sure of that, is that correct?

A. Recollecting my memory on them, I saw those specifications at Fort Lewis when talking to the mechanical engineer there about the boilers that they were going to use, and from that on I don't know when later on I saw them, until I saw them here in this trial.

Q. All right, didn't you have a copy of those specifications at the time that you gave your proposal to the government on the change in the power house?

A. No, I am quite positive that I did not, because there was really nothing in here that concerned that bid of mine, that those specifications in particular would interest me.

Q. Well, Mr. Anderson, the specifications were

(Testimony of Eivind Anderson.)

the only things that were out that governed that changed bid on the power house?

A. This specification?

Q. Yes.

A. No, this specification does not govern the change on the boiler house at all. It does not even deal with the change of the boiler house. [437]

Q. Isn't that the complete set of specifications which covers the change in the power house?

A. No.

Q. Have you ever compared those, Mr. Anderson? A. It might be——

Q. Just a minute now, have you ever compared those with the original specifications that are found in Exhibit 2? Just answer it "yes" or "no". Have you ever compared them?

A. Yes, I have compared them slightly.

Q. All right, don't you know that paragraph by paragraph they take up the subject matter that was in the original specifications?

A. They don't.

Q. Wiring and everything else, with one exception, the steam distribution system?

A. They don't. They might be identical to the ones in the main specification in many instances, because of the fact that those are in fact a boiler specification, which I recognize now as being prepared probably years ago before we ever got this contract, and merely concerns itself to specify such type of boilers, and it is evidently drawn by the

(Testimony of Eivind Anderson.)

boiler manufacturers themselves to cover their particular product, and of course——

Q. Is that true also then of the original specifications?

A. I think that carries a good deal of the same provisions, the only difference in there that I can see is that the original specifications concerns itself with three boilers of a low pressure type and this concerns itself with two boilers of a high pressure type. No other difference that I can find in there is apparent, as far as the boiler [438] is concerned.

Q. Now, on Thursday you said that when you went back to Washington, D. C., and up to the time you came back here, you did not know Mr. Hall was a lawyer?

A. No, I did not know Mr. Hall at all.

Q. Well, I said you testified that you did not know that Mr. Hall was a lawyer, and after you made this trip back to Washington, D. C. and been there ten days or two weeks, you did not know that until some time here recently, is that true?

A. That is true, I did not know Mr. Hall, neither in person or as an attorney.

Q. Well, that was not the question I asked you.

A. Well, that is the answer I gave.

Q. I asked you if you knew he was a lawyer. Didn't you tell me the other day that you didn't know he was a lawyer?

A. I did not know him at all. I say I did not know he was a lawyer or otherwise.

(Testimony of Eivind Anderson.)

Q. When was the first time you learned that, here in the court room?

A. No, I don't think so—I don't think so. I must have learned it a good deal earlier than that, because of the fact that Hall, after this job was finished at Fort Lewis, he rendered me a bill as an attorney for legal service. Then I knew he was an attorney—at least, I anticipated at that time that he claimed to be an attorney.

Q. Are you now saying that was the first time you knew Mr. Hall was a lawyer?

A. Yes, I believe that is the first time it really came to [439] my attention.

Q. Now, Mr. Anderson, I understand from your testimony that the first time you ever discussed the price of the sub-contract with Mr. Rushlight was on May 6th, is that correct?

A. There was testimony to that effect, I believe, that as far as discussing a price or a definite bid, that took place—that took place on May the 6th.

Q. Is it true, as you have testified before, that you positively had no discussion of price with Mr. Rushlight before May the 6th, after you had been out to Fort Lewis and discussed the change in the boiler plans with the authorities there?

A. To the best of my recollection that is true.

Q. He had no—if you had not discussed the price, of course he could not have been promised any contract of any kind prior to that time, is that true? A. Yes.

(Testimony of Eivind Anderson.)

Q. Now, going back to April 8th, as I understand you, you had never—you said you had never met Mr. Rushlight prior to April 8th, the morning when the bids were actually opened down at Fort Lewis?

A. I recall as being Mr. Rushlight's testimony. I did not testify that, I don't think.

Q. Did you not testify here the other day that the first time you ever saw Mr. Rushlight was the morning the bids were opened when the representative of your surety company took you to Camp Lewis?

A. No, I did not.

Mr. Peterson: That was not on this job. [440]

A. I did not, I remember Mr. Rushlight testified that he never met me before this bid opening.

Q. Well, now, had you met Mr. Rushlight prior to the morning of May 8th, or of April 8th, 1941?

A. I seem to recall I have met Rushlight before, not on that particular job but on other occasions.

Q. Did you ever have any business with him before April 8th?

A. No.

Q. Has he ever bid anything to you before April 8th?

A. Bid anything to him?

Q. Yes.

A. No, I never gave him a bid on anything.

Q. Has he ever made a bid to you prior to that time?

A. I couldn't really recall that. It is possible, but I can't testify as to that.

Q. All right, then, in the month of April—

(Testimony of Eivind Anderson.)

say from April 1st, 1941, to April 8th, 1941, had you seen him? A. During that interim?

Q. Yes. A. No.

Q. So far as anything in this case or this contract is concerned, the first time you ever saw him was on the morning of April 8th, is that right?

A. I recall that.

Q. And then it was by happenstance that he met you some place in town here with your bonding company agent, is that correct?

A. Yes, that is the recollection I have on that. The bonding agent said that he wanted to stop—come through town and pick up Mr. Rushlight, he wanted to go to the bid [441] opening.

Q. And then Mr. Rushlight accompanied you to the bid opening, or rode in the same car with you, in the same car down to Fort Lewis?

A. He did not accompany me. He was a passenger of the bonding agent.

Q. That is what I said, he just happened to ride in the same car? A. I recall that.

Q. After the bids were opened on May 8th—or April 8th, your bid appeared to be the low bid, did it not? A. Yes, it did.

Q. And then, you left Camp Lewis, did you not, and came back to Tacoma? A. Yes.

Q. You did not see Mr. Rushlight again from the morning of April 8th, or hear from him from that morning of April 8th until about April 12th?

A. That is my recollection.

Q. And then, without having any discussion with

(Testimony of Eivind Anderson.)

you regarding giving you a bid, price, terms, or anything else, he called you up long distance from Moscow, Idaho, on April 12th, is that correct?

A. Well, now, I think there might be something in there that is missing, because I recall Rushlight rode into town in the same car and at that time he made remarks that if I got this contract he wanted to bid with me, and wanted to get in on it, and he says, do the plumbing.

Q. What did you tell him?

A. Well, I told him that I would determine that if I got the [442] contract.

Q. Now, at the time you started your—you had made your bid of April 8th, you did have bids from other people for plumbing and heating upon which to make up your own bid, did you not?

A. Did I get that date right?

Q. On April 8th, I say.

A. Prior to April 8th?

Q. Yes.

A. I had telephone quotations.

Q. From how many people, do you remember?

A. I don't recall, but I know definitely that Hasdorff of Portland called me and it is possible there was others, I think, also. I think also Mr. Urben called me that he was endeavoring to get a figure on the job. It was late, he did not know whether he could get it out or not in time.

Q. But, you did not have one from Mr. Rushlight?

A. No, I heard nothing from Mr. Rushlight.

(Testimony of Eivind Anderson.)

Q. So then, on the way back to town Mr. Rushlight said if you got the job he would like to figure with you, is that it?

A. He said that he was delayed in getting out his figure from the start, but he said, "We can work that up, if you get the job, I want to give you a price", he said.

Q. He was not a friend of yours, was he?

A. Well, I don't know what you mean, a friend.

Q. Well, he had never prior thereto visited at your home?

A. No, he never had dinner with me or anything like that.

Q. Or had he ever done any business with you?

A. No, we had never done any business. [443]

Q. Then, on the 12th of April, you say that—you testified I believe that he called you long distance from Moscow, Idaho. That is correct, is it?

A. That is right.

Q. Now, on the 12th when he called you, what did he say?

A. He asked how I was getting along out there at the constructing quartermaster out at Fort Lewis, in getting this contract signed up—if I had it or the status of it, and then I told him I did not have it and I had not received any definite information whether I would get it or not, and I intended to go back to Washington to find out just what the delay was, and if there was anything there I could speed it up on.

(Testimony of Eivind Anderson.)

Q. Then, he told you he would meet you in Spokane, did he?

A. Yes, he said that he had in mind to go back to Washington himself and on other business and he might be able to see me at the airport at Spokane and probably take the same plane.

Q. And you left the same day, did you, from Tacoma?

A. I left—no, I left from Seattle.

Q. But, you left the same day?

A. I don't think so.

Q. How long—

A. I think he called me the day before I left, or the same day. Now, I wouldn't recall that, that would be practically impossible.

Q. Did he say anything to you about telephoning to Portland or to his attorney, Mr. Hall?

A. That he was?

Q. Yes, that he was going to do anything to help you on your [444] contract? A. No.

Q. Now, as a matter of fact you did not even disclose to Mr. Rushlight in your telephone conversation of April 12th, that you are having difficulty getting the contract?

A. Oh, I was not having any difficulty, I didn't recall any difficulty.

Q. Well, if you were not having any, you did not tell him you were having—

A. I didn't have the contract, I told him it had not been awarded.

(Testimony of Eivind Anderson.)

Q. It had not been awarded. You did not say you had any difficulty?

A. I couldn't say I had any difficulty because the contract would not be awarded in two or three days after it was bid.

Q. Put it this way, Mr. Anderson, there was nothing in your conversation with Mr. Rushlight to enlighten him or to advise him in any way that you were having trouble or anything other than you simply did not have the contract on April 12th?

A. Well, I don't know now what Mr. Rushlight's actual conversation was. His conversation was that—the substance of it was that he intended to go to Washington on business.

Q. That is right.

A. And he wanted to see me at the airport, if he could get his business cleaned up back there he would go back on the same trip, and I assumed that he done that merely to [445] have an occasion to talk to me more about this sub-contract and probably be ready and be prepared to give me the lowdown bid and get the job; in other words, his method of selling his business.

Q. You judged from his conversation, then, that his only purpose in coming to Spokane and Mr. Rushlight going to Washington, D. C. was to take care of some business of his own, and talk maybe with you about how good a job he could do—sell himself to you on a job on April 12th, is that correct, Mr. Anderson?

(Testimony of Eivind Anderson.)

A. I don't recall going into any specific details of why he wanted to come there and how he wanted to come there or any other thing that he mentioned than what I have already testified to.

Q. Well, I want you to tell me again, that is why I am asking you. A. There wasn't.

Q. There wasn't, now, you just—in short, the conversation was that you had not—he called you up to ask you if you had got the contract yet, that is right?

A. Well, he asked me how I was getting along and getting this contract, what the status of it was and it is possible that in the conversation that he might have intimated to me that he knew something he wanted to tell me at Spokane.

Q. Now, did he intimate that he knew there was something wrong about your not getting the contract?

A. He did, as I recall that conversation at Spokane, he opened up with the statement that he had had a telephone conversation with Senator Holman and from that conversa- [446] tion he concluded that it would be difficult for me to get this contract.

Q. He told you that—he discussed with you then, that he had a conversation with Senator Holman between the time you talked to him on the 12th and the time that you got to Spokane?

A. No, I would not say that. He did not mention what time it was. He did not say the date of the conversation, but that is to the best of my recol-

(Testimony of Eivind Anderson.)

lection—that is the way he introduced himself on the subject.

Q. Well, now, let's stay with the 12th. Senator Holman's name was not mentioned in the telephone conversation of the 12th?

A. Not that I know of, as I recall.

Q. And then, is it your recollection now that on the 12th he intimated to you that you were going to have trouble getting this contract, or not?

A. No.

Q. Or did that occur in Spokane?

A. I don't know what he intimated, what trouble I was going to have. He said he had talked to Mr. Holman.

Q. Was this on the 12th?

A. Well, that was when I arrived at Spokane.

Q. Now, I want you to confine yourself to this telephone conversation that you had.

A. I think I arrived there the 12th, and this telephone conversation, there was nothing said about calling Holman or having trouble, in that.

Q. Well, did you get in Spokane on the 12th, was it?

A. Oh, yes, I arrived on the 12th, the same day I left. [447] naturally.

Q. Well, you left on the 12th. Well, then, this conversation with you was a day or two prior to that?

A. Yes, it was.

Q. It must have been the 10th or 11th, then, is that right?

A. Most likely on the 11th.

Q. Now, in that conversation that was between

(Testimony of Eivind Anderson.)

Rushlight in Moscow and you in Tacoma—I am trying to find out from you now, if you now say that Rushlight told you you were going to have trouble in getting this contract?

A. In the conversation?

Q. Over the telephone.

A. I don't recall that.

Q. Then, you got on the plane and when you got to Spokane you got off the plane to meet Mr. Rushlight?

A. I did not particularly get off the plane to meet Rushlight. The plane stopped at the airport. There might be other reasons you want to get in the airport. It is customary to step off, you know.

Q. You did not—one of the reasons you got off the airplane there was not to see Mr. Rushlight, is that right?

A. I did not stay on the plane or try to stay on the plane for the purpose of evading Rushlight. I stepped off the plane and met Rushlight there.

Q. When you got off the plane, did you look for Mr. Rushlight?

A. No, I walked right in the station for my purpose of going there and Mr. Rushlight was right there intercepting me.

Q. You did not look for or intend to look for him?

A. No, I don't recall I made any special effort to look for him. [448]

Q. Then, when you saw Mr. Rushlight there, Mr. Hall was with him?

(Testimony of Eivind Anderson.)

A. The two of them was together and Mr. Rushlight introduced me to Mr. Hall as his secretary.

Q. Now, will you just tell me now again, what that conversation was—it was very short, wasn't it? A. It was very short.

Q. Will you just tell me again what the conversation was between all three of you?

A. Yes. The substance, he says that—

Q. Say who it was.

A. He had a telephone conversation with Holman of Portland, and heard from him that it might be questionable whether the contract would be awarded to me and that he had after that decided to have his secretary go to Washington in place of himself, and he would make his trip around to New York and that Mr. Hall, who was his secretary, he thought that he might have more influence with Senator Holman by the fact that he was his campaign manager. At that point I interrupted and I said, "Boys, now let me get this straight, if this is your intention to make a trip to Washington to represent me", I said, "I think that is entirely superfluous, because of the fact that I am well acquainted in Washington. I have good connections there with my own representative here from Tacoma, Congressman Coffee, whom I know intimately and don't go out of your way, boys, to make any trip to Washington for me, if that is what you mean." They explained, no, that was not the idea, they were going back on business. He had

(Testimony of Eivind Anderson.)

his ticket and he was going on this plane and very [449] well, then——

Q. Well, the conversation opened up, you say, with Mr. Rushlight telling you that he had had a telephone conversation with Senator Holman at Washington, D. C., that is the way this conversation in Spokane——

A. At the airport.

Q. Did he tell you whether the Senator had called him or he had called the Senator?

A. No, I don't recall how that was. There was a conversation by the telephone, he mentioned.

Q. Did you ask him, "Well, how did you happen to be——"

A. No, I did not inquire.

Q. "Sticking your nose into my business and calling Senator Holman"?

A. There wasn't any question about that. I figured that that was out of my territory to ask those questions. He had a right to call Mr. Holman on any business he wanted to if he so chose.

Q. You did not ask him?

A. I did not ask him to call Mr. Holman at all.

Q. Prior to that, before you got to Spokane you had not requested Mr. Rushlight to either contact his own lawyer or to contact Mr. Holman?

A. Absolutely not,—absolutely not.

Q. And the first part of this conversation in Spokane was devoted, as you told us then, to his telling you how he talked to Senator Holman and how he decided now to have his lawyer go to

(Testimony of Eivind Anderson.)

Washington, D. C. because he thought he had more influence for getting a contract than Mr. Rushlight would have? [450]

A. He did not say he was his lawyer, he said he was his secretary.

Q. Well, his secretary, he said, would have more influence in getting a contract than he would?

A. No, he said his secretary would have more influence with Holman.

Q. Influence about what?

A. I suppose he iniated with the War Department or something.

Q. Have influence to do what, or get what?

A. Get contracts, or I know what they were talking about and I said, "I am not interested in that service; if you want to go to Washington for that purpose, just put it off your mind." I said, "I am not interested and I would not assume any obligation whatsoever."

Q. Did you tell him in advance you would not assume any obligation?

A. Yes, I said if that is what they had in mind I was not interested in assuming any obligation in that respect, and they pointed out that they were going back on business and they will make this arrangement independent on anything else that might come up.

Q. All right, then, you did not at that time give Mr. Hall a hundred dollars in cash, right at that place?

A. No, I did not.

(Testimony of Eivind Anderson.)

Q. Did you give it to him at any other place?

A. I don't believe I would give it to him if he asked me for it. He was a stranger to me.

Q. And you did not give it to him any other time or place? A. No. [451]

Q. And then Mr. Hall did get on the plane, the same plane with you when you went to Washington, D. C., that is correct, isn't it?

A. That is the route we took, yes.

Q. And when you got in Washington, the first day you were there, you were unable to find a room to stay in—a hotel room, were you not?

A. Well, I wouldn't say we were unable.

Q. Well, you did not find one?

A. There was rooms, but they were rather hard to find. The town was crowded. The hotels were crowded. We had to call several places to get accommodations because there was no reservations made.

Q. Didn't you end up by you and Mr. Hall, the first evening you were in Washington, D. C., sleeping in a private residence?

A. That is possible. We took whatever accommodations were available.

Q. And then in fact you slept in the parlor or dining room in somebody's private home?

A. I don't care, we slept some place.

Q. The two of you?

A. Yes, I think Mr. Hall slept too, I know I slept.

(Testimony of Eivind Anderson.)

Q. Then you went on the next day and went to a hotel and had adjoining rooms at the hotel, did you not, during the entire time that you stayed there?

A. That is right, we had rooms in the hotel, Hotel Hamilton, as I recall it.

Q. When you left Washington, either by mistake or otherwise, you got the bill for the hotel rooms for approximately two [452] weeks and paid it?

A. Yes, I know I paid the bill when I cleared out of the hotel.

Q. Now, while you were in Washington, you and Mr. Hall went from one office to another, did you not, to the War Department?

A. Well, of course I don't know what you mean by "one office to another."

Q. Well, seeing about this contract?

A. I went to the War Department, contacted the officials there, as I was directed to do, or informed to do by the congressman.

Q. Didn't Mr. Hall go with you?

A. I think he was with me on one occasion.

Q. On just one occasion?

A. That is as far as I recall; I know he was there together with the secretary of Mr. Coffee the first time I called.

Q. Now, would you say that only on one occasion did he go to any office with you—that he did go to any office with you?

(Testimony of Eivind Anderson.)

A. Is I recall, there was only two occasions on which we saw the War Department.

Q. Well, was he with you on both of those occasions, or just one?

A. No, I don't think he was. I think he was absent one time I was down there. He was busy with something else.

Q. After about two weeks you left Washington and came back to Tacoma, did you not?

A. I don't recall exactly now the length of time that I was in Washington. It might have been close to two weeks [453] from the time I left until I got back. I made a trip to Boston and spent a couple of days up there. The time I traveled, I guess it took about two weeks.

Q. Then, after you got back to Tacoma here, you did not see—did you see or hear from Mr. Rushlight while you were back in Washington?

A. No, I did not hear from him.

Q. No contact with him at all during that time?

A. Mr. Hall told me he had telephoned him in New York he was coming in, I think. That was about the last I was there.

Q. When you got back out here to the Coast, then, the first thing that happened, you got this Exhibit 3 which is the letter dated April 26th, where the quartermaster asks you for revised plans, that is right, isn't it?

A. Now let me get that straight, Mr. Lycette, just what you asked there.

(Testimony of Eivind Anderson.)

Q. After you got back out here, the first thing that happened in connection with this contract was that you got this letter, Exhibit 3, I think it is dated April 26th?

A. I think that is the first thing that happened officially that I recall.

Q. Now, up to that time I believe you testified that you had not seen Mr. Rushlight?

A. Prior to that?

Q. That is right after you came back from Washington? A. I am positive.

Q. And after you got that letter, Mr. Rushlight called you up voluntarily, did he, and told you that there was a change order being made and he could help you and give you [454] some information about it?

A. Yes, I recall that he told me that he had been asked to go to Fort Lewis and assist some persons there, or the construction quartermaster to give him an estimate on a revision of the heating system.

Q. Do you recall about when it was—he called you up to tell you that, did he not?

A. He called me up.

Q. Do you recall about when it was that he called you to do that?

A. When he called me?

Q. In relation to this letter, yes.

A. Oh, it might have been—it might have been two or three days subsequent to this letter.

(Testimony of Eivind Anderson.)

Q. Now, up to that time he still of course had no contract with you and had never given you a figure on doing the work, either orally or in writing, had he?

A. No one ever had a contract with me before I got the contract myself.

Q. All right, the other part of the question, he had not up to this time given you a figure orally or in writing about the contract?

A. Not any definite figure, no, sir.

Q. And after he volunteered to assist you in working out some figures in connection with the call which the quartermaster had asked for in the letter of April 26th, you and he sat down together and worked out a set of figures, did you not?

A. You said after he volunteered to give me figures?

Q. That is right. [455]

A. Well, I don't know whether he volunteered to give me those figures or volunteered to give those to the constructing quartermaster.

Q. When he called you up on the phone, where was he, do you remember, when this call came through?

A. I don't know whether he called me from Fort Lewis or from town. I recall he called me and told me that he had been asked by the constructing quartermaster at Fort Lewis to work up some computation for this kind of heating system.

Q. Well, did you say he called you from some

(Testimony of Eivind Anderson.)

place and said that the quartermaster had asked him to work up with you, or help you work up——

A. No, no, that was not the conversation.

Q. Well, what was it?

A. The conversation was not that the constructing quartermaster had asked him to help me, but the conversation was that he had been asked by the constructing quartermaster to help them.

Q. Oh, to help them? A. Yes.

Q. With some figures; all right, when he told you that the constructing quartermaster asked him to help the government on some figures, what was the rest of the conversation then?

A. He said now then he would have those figures and if I wanted them it would help me materially to get my bid in to the government on this revision.

Q. Now, when he had this conversation with you, over the telephone, Mr. Anderson, what did you think, that he was working for the government at that time? [456]

A. I didn't know. I didn't know whether he was actually hired by the government to do this. I would assume that he was, because the government generally don't ask people to work for them for nothing.

Q. All right, then, when he came up with a set of figures which he submitted to you, did he—he brought up a set of figures?

A. He called me from the hotel after refreshing my memory on this thing, he called me from the hotel and that is probably where he called me from

(Testimony of Eivind Anderson.)

in the first place, and after I told him that I still was a little bit behind in getting out a definite figure because I just received the plans and I didn't have sufficient time to go over the drawings that would cover all the rest of the work that would be involved in that revision item, and I think he at that time asked me if I took my stuff down there to the hotel, the estimate, that I probably had the quantities, that he had, that we could work it up and get in a bid because at that time he told me that the people out there at Fort Lewis were very anxious to get a price in on this so they could go ahead with the work, and this contract; and as I recall after this conversation I picked up the information that I had and I went down and had a conversation with him down there at the hotel, to the best of my recollection. I think you showed me here a proposal, and in following up I recall that after we talked to and fro about the cost of this job, that we made up a bid there. That was typewritten by the hotel secretary, hotel stenographer—public stenographer.

Q. Is that this bid of April 30th that you forgot about the [457] other day?

A. I believe that is—I believe that is, and he asked me if he could have a copy of it. I think I made up several copies.

Q. Don't you remember the other day you said you threw it in the waste paper basket and if he got it he must have taken it out of the waste paper basket?

(Testimony of Eivind Anderson.)

A. No, sir, I said I didn't know that, if he got it that is the only way I could assume he got it.

Q. The fact is, you just now testified he gave it to you. Did he get it out of the waste paper basket, or——

A. I don't know, that is the only connection——

Q. Now, when he came in,—you can go on with your story,—when he came and talked to you over the phone and you assumed he must be employed by the government to do work on these figures and he got together and as a result of that worked out this exhibit, is that 4? A. Yes, that is 4.

Q. Exhibit 4 of April 30th, is that correct?

A. That proposal was made on the 30th of April.

Q. No, the question I asked you, Mr. Anderson, is this: You have already told us that after he talked to you on the phone you gained the impression that he must be working for the government. Then I am asking you with that impression on your mind, you and he got together and worked out this proposal, that is Plaintiff's Exhibit 4, is that correct?

A. Well, I don't know how we worked it out together, except that he gave me those prices that he shows here on this breakdown. [458]

Q. Well, let's take them separate.

A. He showed me that the difference in the heating plant would be \$10,537.00 plus \$1500.00 overhead which is shown here, and plus \$1800.00 up above there for foundations. Now, that is, of

(Testimony of Eivind Anderson.)

course, the only information that he could have given me.

Q. Well, now, just when he came up there, just tell me what he had with him or what he did when he got to the hotel?

A. I wouldn't venture to testify here three years after this happened absolutely every move he made and every word he said, but I recall this thing very hazily, that he called me up and said he had this information and if I would come down there to the hotel he would give it to me.

Q. All right, when you got there what information did he give you?

A. He gave me this copy, a copy of this breakdown here showing the new original estimate and the revised estimate.

Q. Now, that Exhibit 4 consists of two sheets, there. Now, which sheets are you referring to that he gave you, the one signed by him or the one signed by you?

A. That would be the one that bears his name. Whether he signed it or not I don't know.

Q. Was it already made up in the form you find it attached to there?

A. You recognize, that the government would not recognize this second sheet as signed by Rushlight, that would be of any value to the government in bidding direct by me.

Q. I am asking you now, Mr. Anderson, if that second sheet of Exhibit 4 was all made up and

(Testimony of Eivind Anderson.)

signed by Mr. Rushlight [459] when he came to the hotel and met you?

A. It was not signed, I am satisfied of that because there would be no purpose in signing it.

Q. Was it made up at that time?

A. Yes, it was made up. It must have been, to the best of my recollection, it was made up.

Q. All right, now, when was the second sheet made up there, the one that you signed?

A. That bears the date of April the 30th.

Q. Well, I say, when was it made up, the same day?

A. According to the date it is on April 30th.

Q. What is your best recollection as to where those figures came from that are on that sheet?

A. Those figures evidently are my own figures.

Q. All right, did you have those when you met Mr. Rushlight or did you and Mr. Rushlight together work those figures out?

A. I evidently had those figures, because I don't think Rushlight would be competent to even figure this out himself if he tried to.

Q. You think you had those all made up by the time you got there?

A. I think I had the items. Whether they were all made up I don't know.

Q. Then you and Rushlight talked about it and I think you said that you and he decided to write up a complete bid, is that correct?

A. That is what we did and what we decided on. Outside of that, I can't testify to it.

(Testimony of Eivind Anderson.)

Q. Well, how long were you together on that occasion? [460]

A. It couldn't have been very long.

Q. Well, how long, give us your best estimate or guess? A. Probably half an hour.

Q. How? A. Probably half an hour, I say.

Q. In half an hour, and then in half an hour the figures which are on the sheet signed by you and the letetr of April 30th were made up and put into form and typed, were they?

A. It took probably some time for the secretary to type them off. It might be thirty minutes or so.

Q. Who typed them up?

A. Who typed them?

Q. Yes.

A. If this is the letter that was typed there, it was typed by the public stenographer in the hotel.

Q. Who gave the information to the public stenographer?

A. It is my letter, so I naturally gave it myself. Most likely I dictated this letter myself to the stenographer.

Q. Then, after the copies were back, you signed up a number of copies including that particular one there, did you not? A. Uh-huh.

Q. Mr. Rushlight asked for it and you gave it to him?

A. He evidently did ask for it or got one from the secretary, I don't know.

Q. Well, now, this was a public stenographer?

A. Yes, it was.

(Testimony of Eivind Anderson.)

Q. Well, now, when he asked for one and got it, he got it from you, didn't he? [461]

A. It is reasonable to assume that he did, yes.

Q. Now after he had those, you had given that to him and made it up, did he go away then, or do you remember what happened then?

A. I don't remember what happened. The only thing I recall what happened is, we concluded this conversation and I went down about my business and probably went home to get a letter—to get an envelope or something to put this proposal in, with the intention of giving it to the government.

Q. Now, what was your purpose in the beginning of getting together with Mr. Rushlight there and writing up that letter?

A. Well, the purpose was, as he explained to me, that it would expedite the matter of getting in this bid. That was the only purpose that I seen.

Q. The initiative was all from Mr. Rushlight then, telling you this to hurry up and get in a bid?

A. It seemed to be.

Q. Did he say anything to you about figuring it on a good safe basis that day?

A. Yes, he said that he had gone through that mechanical part and he made ample allowance for those changes and if there was something that I should happen to miss in my own, that it would balance up—probably balance up with what he had overestimated.

Q. Now, he knew nothing about the portions that are shown in your letter signed there?

(Testimony of Eivind Anderson.)

A. That was his suggestion. Now, he did not say he knew anything about it. He of course recognized that if I was to [462] bid in a hurry, that I—there could be a possibility of overlooking something.

Q. In the part that is covered by the letter you signed, you did all that figuring yourself, because that was your work to do?

A. Yes, I did all that figuring from the information I had. I explained to him that my time had been very limited to go over those drawings, because they had just issued the drawings, and I didn't have very much time to spend on them.

Q. Put it this way, I will just make it clear. At no time was Mr. Rushlight ever going to do any of that work that was covered in your letter, in your part of that letter, in the letter signed by you?

A. In my part of the letter?

Q. Yes.

A. In my part of the letter everything is covered for that revision at a total price of \$23,142.00.

Q. All the work was to be done by you and not by Mr. Rushlight?

A. There wasn't any work to be done by Mr. Rushlight, particularly, except that he got the contract for it.

Q. Well, did you say a little while ago that all of this work outside of that covered by the twelve thousand dollar item was work which Mr. Rushlight was not familiar with and you did not think he was

(Testimony of Eivind Anderson.)

competent even to bid upon? That is correct, isn't it?

A. Well, he did not explain to me, at least, that he was competent, and hasn't made any effort, to the best of my knowledge, to estimate it. [463]

Q. He had nothing to do with the preparing of the rest of the figures then other than the \$12,000.00?

A. He had nothing particularly to do with anything except what he volunteered to do.

Q. Then, you say you took it home and intended to get an envelope and send it out to the quartermaster, is that correct?

A. I recall that that would be the following step to be taken there, if that letter was to go in.

Q. But then, some later time you say you decided not to send that?

A. I took time to recheck my work over the plans, and I concluded that I acted too hastily here, I would take more time and let the constructing quartermaster wait a few days until I got everything that I was satisfied it was the way it should be, so I never submitted this letter. I threw it away.

Q. You did not even retain a copy in your own files?

A. No, I did not. I never saw it in my own file.

Q. You have never seen that letter since?

A. No, I have not, I threw it away.

Q. Now, when you made up the new proposals you were going to sign, you made them up at your

(Testimony of Eivind Anderson.)

home and Mr. Rushlight was not there and had nothing to do with it, is that correct?

A. I don't think so, I don't think he had anything to do with that. I don't recall that he had any hand at all in making that proposal. It was made in my own office and I have no recollection of him being there at all.

Q. Now, in your new proposal—that is, Plaintiff's Exhibit [464] 5, dated May 6th, is it not?

A. Yes, sir, that is.

Q. And you had plenty of time then to sit down and work that one out for yourself, and did so?

A. Oh, yes, I had more time evidently on it.

Q. Now, did you have any bids from any one else in the meantime on doing——

A. In the revision?

Q. (Continuing): ——doing the revision work there?

A. Oh, yes, I had prices on the other mechanical stuff.

Q. You got prices from whom?

A. Roy T. Early, got prices from him on the boilers and those items that went into that phase of it.

Q. Now, during this time were you soliciting offers from other people for the plumbing and heating work, generally? A. No, I was not.

Q. This last letter which was introduced here, it came from Hasdorff. Now, that came in on May 5th, didn't it?

(Testimony of Eivind Anderson.)

A. No, it probably did not come in on May 5th. It probably came in on May 6th.

Q. Or May 6th?

A. I would say so, during that interim. I am not positive.

Q. That is the only other bid that you had in between—is that the only other bid that you had in between the time of the original bidding and——

A. That is all I recall of.

Q. Now, Hasdorff had given you this figure of \$286,000.00 you say, orally, prior to the bidding on April 8th?

A. Yes, he called me on the phone and gave me a price orally. [465]

Q. And this letter of his of May 5th is simply putting that in writing?

A. I think so. It amounts to about the same thing.

Q. This letter of May 5th from Hasdorff had nothing to do with the revised plan or substituted plan for the plan for the power plant, did it?

A. Oh, that is confirming—that is his bid on the main—under the original specifications.

Q. On the original specifications? A. Yes.

Q. Now, when you figured your new proposal which went into the government on May 6th,——

Mr. Lycette: May I ask Your Honor what exhibit that is?

The Court: This is Exhibit No. 5.

Q. (Continuing): ——which is Exhibit No. 5, you figured the boilers at \$12,000.00, did you not?

(Testimony of Eivind Anderson.)

A. Not the boilers alone, including the foundations.

Q. The boilers and foundations at \$12,000.00?

A. Yes.

Q. Of that amount you had figured \$1500.00 for the foundations for the boilers, had you not?

A. I think that is the way it worked out.

Q. Now, you did not see Mr. Rushlight from April 30th until May 6th, did you?

A. I don't recall having seen him.

Q. Well, your best recollection is that you did not see him during that time, did you?

A. No, I don't think I saw him. He might have called me on the phone, but I have no positive recollection of it. [466]

Q. On May 6th, Mr. Rushlight met you in Tacoma, did he?

A. I don't recall just how we met at Tacoma, but I recall that we went out there in my car, and it was along there with this figure. The constructing quartermaster—I believe he called me on that day and asked me if I was going out, he wanted to go along.

Q. And when you got out there, he submitted this letter of May 6th and you say they told you orally at that time that it would be accepted?

A. That is right.

Q. And then you drove back into Tacoma?

A. That is right.

Q. And at that time was it that day that they

(Testimony of Eivind Anderson.)

told you verbally out there that your main contract had been accepted?

A. Yes, and the revision had been accepted—the whole thing had been accepted.

Q. That the whole thing had been accepted, so then that was the first time you knew that you were going to get the main contract—knew it definitely, wasn't it?

A. That was the first time I had an official instruction to proceed with the contract.

Q. Now, up to the time that you got back into Tacoma, on May—

A. You asked me there of that was the first time I knew that I would get a contract, did you?

Q. I did ask you that.

A. Well, I would say that I knew that from the time that I left Washington, as far as an understanding was.

Q. You had been advised unofficially that? [467]

A. Yes.

Q. That you would get it? Now when you went out—when you left Fort Lewis on May 6th and came back into Tacoma, up to the time you got back to Tacoma you had not had any oral or written bid from Mr. Rushlight to do the plumbing or the heating? A. Not as to price.

Q. Price had never been—price had never been mentioned between you and Mr. Rushlight up to that time?

A. No, there was no occasion for it because the contract was submitted for a revision and I was

(Testimony of Eivind Anderson.)

working on that to get those revisions set up so that I could—would know what the requirements would be. Right at that time there naturally would not be any occasion to inquire for prices.

Q. When you got back to Tacoma what happened then?

A. When I got back to Tacoma?

Q. Yes. A. When?

Q. On May 6th. A. On the way in?

Q. That is right.

A. We discussed what the prices would be for the heating and plumbing item.

Q. Did you put it this way, "Well, now, now I am ready to talk business with you and now you can give me a figure on what you will do it for"?

A. I think that was the substance of the conversation on that score. I knew I was going—I was having a contract and I was ready to go. [468]

Q. Had you promised Mr. Rushlight or any one else this heating and plumbing contract work before that date?

A. No, I had no occasion to promise it to anybody.

Q. What did you say to him when you first talked price with him on May 6th?

A. Well, I said, "Now I am ready to go, I have got the contract now. Now I am going to be a busy man. Now, if you have anything definite to submit on this heating item, write me up a proposal on it" and there was some talk forth and back as to this fellow's price and another fellow's price and so

(Testimony of Eivind Anderson.)

forth and so on, and I finally said to Rushlight, "I can pay \$293,000.00 as the work stands now. Now, I am anxious to go. I haven't got the time to call for a lot of bids, and if that interests you, why, make up your mind".

Q. Up to that point, Mr. Rushlight had not given you any figure at all, you just simply stated \$293,000.00, did you not?

A. Well, I knew that Mr. Rushlight, whether he stated it or not, knew what the prices were that were bid on that contract. He was not unfamiliar with it. I think he mentioned it himself, what those prices were. Of course, my policy is not to reveal prices to anybody until I am ready to buy.

Q. Had you told Mr. Rushlight up to this time on May 6th what price you had from any one else?

A. Up to that time?

Q. Yes. A. I don't recall.

Q. Don't you recall testifying here before that you did not? [469]

A. I wouldn't say; if I followed my own principle I wouldn't, because it doesn't enhance my proposition to tell the other fellow everything I know.

Q. Well, it was your best judgment that you did not tell him what Mr. Hasdorff's price was?

A. I think that price was discussed right there, going in, see.

Q. This was on the 6th of May that you are talking about now, isn't it? A. The 6th of May.

(Testimony of Eivind Anderson.)

Q. Then, what did he say when you told him \$293,000.00?

A. Well, he said he would take the job.

Q. All right, now, let me ask you this: Did he first offer to do it for \$293,000.00 or did you just tell him, "I will give it to you at \$293,000.00, if you will take it at that price?"

A. Well, I wouldn't exactly remember that statement, three years ago. I know there was an understanding he would get the contract provided he could qualify for it. He said he had a good organization, and that is what I was really looking for, and he was ready to go. He had his organization available and didn't have much work.

Q. He hadn't given you any other figure than \$293,000.00, had he?

A. No, not given me any other figure.

Q. That is the only—

A. I am positive on it.

Q. That is the only figure he ever gave you was \$293,000.00? A. Yes, it was.

Q. And that was on May 6th? [470]

A. Yes.

Q. Then you told him—what did you tell him then, to give you an order?

A. I says, "Now, you write up your proposal and we can get *get* action on this." and he says, "I am going right in now and get to the hotel", and he says, "I will call the Early people and place an order for the boilers."

(Testimony of Eivind Anderson.)

Q. Then he went ahead and ordered the boilers on May 6th, is that right?

A. That is the date, I am sure.

Q. Then on May 9th he came in. You did not see him again until May 9th, did you?

A. I don't think so, I don't recall.

Q. Then, on May 9th he brought you Plaintiff's Exhibit 8. Will you just answer that "yes" or "no"?

A. Yes, he did.

Q. Had you talked to Mr. Rushlight between May 6th and May 9th?

A. No.

Q. On May 9th then he came in with that?

A. I wrote—yes, yes he came in with that proposal.

Q. And there was no discussion that day on price at all, was there, on May 9th?

A. No, there was no discussion on that day. He came in late in there with that proposal, between 8:00 and 9:00, and submitted it.

Q. When he came in you say it had the \$293,000.00 figure written in in longhand as it now appears?

A. That is right.

Q. The date when he submitted it to you then is—it was [271] April, still bore the typewritten number April 3?

A. That is right.

Q. And you called his attention to that and asked him to change it, or did your son, one or the other change—

A. I think my son called his attention to it at first, and he explained that it—he marked that bid "revised". That would bring it up to date, and at

(Testimony of Eivind Anderson.)

that moment I suggested that he better also mark the date in there to make it up-to-date, so he wrote in there May 9th.

Q. Well, what in the world was there to bring up to date on May 9th if he had never submitted you an oral or written proposal before? What was there to bring up to date on May 9th?

A. That was of course, his letter—his proposal there marked—purportedly marked April the 3rd, and of course we had—we had since got this revision in of the boiler plant in there. That would be it, to bring it up to date if that question came to—

Q. Well, now, you never discussed that that evening at all. You never even mentioned the boiler situation that evening?

A. No, because we had discussed it so thoroughly before, there was really no occasion to go over and discuss it again. That was covered.

Q. All right, there was no discussion of the boiler situation—revised boilers at all on May 9th?

A. Not that I recall, that was brought to any discussion. The only discussion that I recall was whether or not I would require a bond, a performance bond.

Q. Mr. Hall was along with him, was he not?

[472]

A. Yes, sir, Mr. Hall was along with him.

Q. Did he take any part in the conversation, or have anything to do with it? Do you know what he was there for?

(Testimony of Eivind Anderson.)

A. He didn't say at that time whether he was his secretary or his attorney.

Q. Do you know what he was there for?

A. No, I do not. He was there with Rushlight and I understand he was just part of the firm.

Q. You still thought he was in the heating or contracting business?

A. I thought he was in the heating and contracting business with his employer, there, or whatever it was.

Q. Did he participate in the conversation at all at that time?

A. Yes, he took part in the conversation and endeavored to explain to me that the necessity of a bond was just a waste of money in their instance, they being a large firm and had handled large contracts, and it was just throwing money away to pay this money for a surety bond. That in fact, was the substance of his discussion as I recall it.

Q. Finally they left it with you and went away, is that correct?

A. They left the proposal and left the house.

Q. You told them you would accept it and send them a letter telling them that you accepted that particular proposal of theirs?

A. I told them that I would accept their proposition now to do this job the way we had arrived at it.

Q. And then a couple of days later you sent them a sub-contract [473] which was introduced here in evidence, dated May 15th?

(Testimony of Eivind Anderson.)

A. Will you please repeat?

Q. I say they left on May 9th and then a few days later you sent them the sub-contract which is dated May 15th?

A. Well I don't think I sent it to them.

Q. How did that come to be signed? Where was it signed?

A. I recall that in my letter that I confirmed this acceptance of the proposal, I pointed out that they furnish a surety bond and I think I fixed a certain date there that that had to be executed, and then on or about on the—May the 15th, I had already started to work at Fort Lewis and Rushlight appeared at Fort Lewis and hadn't offered his bond. Then—his bonding man was there and he said "Would you hold this off till tonight and I think we will have this bond situation fixed up?" So I promised I would hold it over that day and then that evening about 10:00 o'clock Rushlight and his agent came to the house, signed the contract and they furnished a bond.

Q. He had the bond with him all made out, did he?

A. He had the bond there as I recall.

Q. Now, you had not given Mr. Rushlight the contract form prior to that time, had you?

A. I don't recall. I wouldn't want to testify. I can't recall whether I gave him a form of it or not, prior to that.

Q. You made that form up yourself as you heretofore testified?

(Testimony of Eivind Anderson.)

A. The form is a standard form.

Q. I mean, filled it out—you know what I mean. [474]

A. The typewritten portion of it was filled out in my office.

Q. Mr. Rushlight had nothing to do with the preparation of that contract?

A. I don't think he did.

Q. Well, you know he didn't, don't you?

A. Well, I can't recall that he did, so there is nothing I am going to testify on.

Q. Then, when he got the contract to sign, you say that he had the bond signed and all ready made out for a contract which he had not yet signed himself, when he signed that?

A. Oh, there was some confusion there between himself and the bondsman about the furnishing of this bond, and it would be pretty hard for me to testify now just what the actual—I know that the contract was signed on May the 15th, and it is possible that he had a copy of it; that he had evidently—must have had a copy of it in order to obtain his bond. The bonding company naturally would have to have a copy of it and know what it was doing, see, so I didn't follow up on that score personally.

Q. Then following that it was finally signed, the contract on May 15th, wasn't it, late that night, you say?

A. Yes, the contract was signed.

(Testimony of Eivind Anderson.)

Q. Then, following that you asked Mr. Rushlight to give you—no, strike that.

The Court: Will you pass up that contract?

Mr. Peterson: Yes, I think that is a duplicate, Your Honor. I don't know of any changes there (handing same to the Court). [475]

Q. On May 21st, Mr. Rushlight sent you Plaintiff's Exhibit 10, did he not, and in which he asked you if the formal approval of the revision of the power house had been made?

A. Yes, that is the letter from Mr. Rushlight. I received it.

Q. And then, the very next day on May 22nd, you replied to his inquiry whether the power house had been formally accepted and told him by Exhibit—is it 9? A. 11.

Q. By Exhibit 11, and on May 22nd, that your contract had been—or that your proposal for the revision of the boiler house had been accepted and that that letter that you have in your hand there was his order to do the work—the revision work, isn't that right, on May 22nd?

A. Uh-huh, that is right.

Q. Now, Mr. Anderson, the work covered by the—for the revision of the power house is covered by formal change order, called by the government in this case change order—change order A, capital A, is it not?

A. I believe what you are asking now is where the work involved in this revision is covered, is that right?

(Testimony of Eivind Anderson.)

Q. That is right. A. What paper—

Q. You know what a change order is, surely, don't you, Mr. Anderson?

A. I think it is dated May the 6th.

Q. May the 6th. Are you referring to a letter here? A. That is the change order.

Q. Mr. Anderson, I asked you for, in the letter that was served—the notice to produce that was served on you and [476] the supoena that was left at your home on the 1st day of this trial and repeatedly since then, to produce change order A.

A. Change order A and B.

Q. Will you get that for me now?

A. I have that here.

Q. Will you get it for me now?

While counsel is getting that, can you find for me your sub-contract on the sheet metal work?

A. Yes, I have that if you want it.

Mr. Lycette: While counsel is getting this out for me, you might get it.

Q. Mr. Anderson, when I asked you for change order A, why didn't you tell me right away what it was, and get it for me instead of pretending you didn't know what it was?

A. I didn't know what you meant by the document to go ahead and go to work. There is a difference there.

Q. Well, one has a number on it or a title on it, change order A. The other is just a letter, isn't that right?

A. That might be right, yes.

(Testimony of Eivind Anderson.)

Q. Now, what I have handed you now, is Plaintiff's Exhibit 26, is formal change order A, which covers the revision of the boiler plant and that came out of your files. That is correct, isn't it?

A. This covered two revisions or two changes, one change and one revision, if that is what you mean.

Q. That is correct.

A. Then it takes in a change in the water mains—the water mains.

Q. Change order A then relates to two subjects, there are [477] A and B?

A. No, no, they are all joined under A, those changes here covered two subjects, one for two subjects. One is an addition of \$2,856.47 and the other is for \$23,142.00, making a total of twenty-five thousand, nine ninety-eight, four seven.

Q. Well, now, all we are interested in at this time, Mr. Anderson, is the paragraph which is labeled "a", small "a", under change order A, which covers the revised construction of the boiler house. That is correct, isn't it?

A. I believe that is all you are interested in, Mr. Lycette.

Q. And the amount shown for additional compensation to your original contract for the changing of the boiler house was \$23,142.00, that is correct, isn't it?

A. That is right.

Q. And that amount was paid to you for that work, was it not?

A. Yes, it was paid in the final accounting.

(Testimony of Eivind Anderson.)

Q. This change order A, which is your official confirmation, came to you on or after May 23rd, 1941, the date it is dated, did it not?

A. It came to me as I recall on September 5th.

Q. On September 5th?

A. 1941, by letter.

Q. Do you know how it happens to be dated May 23rd then, 1941?

A. No, I do not. The letter stated that it was this change order and it is dated that date, so why it was done that way I couldn't say. It is work of the government.

Q. In any event, the exhibit that I have just shown you is [478] your change order?

A. I would say that the letter speaks for itself. That is the time this paper was made.

Mr. Lycette: I would like to offer that in evidence, Your Honor please.

Mr. Peterson: Your Honor please, I think that it is wholly immaterial, if Your Honor please. Those change orders are just a matter of part of the federal accounting, as the Colonel started the obligation of the government dates officially from the time that it was approved. For instance, we have one that came here four months—the big one, "C", came four months I think after the contract was supposed to have been cancelled. They do not reflect a thing. They are dealings between the government and the contractor on an accounting basis.

The Court: Objection overruled, I will allow you an exception.

(Testimony of Eivind Anderson.)

Mr. Evenson: What number is assigned to that exhibit?

The Court: **Number 26.**

(Whereupon, document referred to was received in evidence and marked Plaintiff's Exhibit No. 26.) [479]

PLAINTIFF'S EXHIBIT No. 26

Contractor's Number

Contract No. W 6105 qm-262

May 23, 1941

Mr. Eivind Anderson

517 North I Street

Tacoma, Washington

Change Order "A"—Increase

Dear Sir:

With reference to your Contract No. W 6105 qm-262 dated May 8, 1941 at Fort Lewis, Washington, for the construction and completion of 400 Bed Hospital and 36 Miscellaneous Buildings, Steam Distribution System for Hospital, Sanitary Sewerage System, Water Distribution System and Electric Distribution System, you are informed that owing to the following mentioned changes in the work thereunder, namely—

- a. For furnishing all material and equipment and performing all labor necessary to construct boiler house and heating plant in accordance with Specification No. Fort Lewis—32, pages ME-1 (sub) to ME-14 (sub) inclusive, and other applicable

(Testimony of Eivind Anderson.)

paragraphs and Plans Nos. 700-1517, Revisions A to E, inclusive; 700-1517.1, Revision A; 700-1518, Revisions A and B; 700-1519, Revisions A and B; 700-1520, Revision A; 700-1521, Revision A; and 700-243, Revisions A to E inclusive, for Boiler House, Type HBH-16, Modified, instead of Boiler House HBH-13 and Heating Plant shown in the contract plans and specifications. Work to include all material and workmanship necessary for a satisfactory operating system that is complete in every respect and detail.

Additional \$23,142.00

b. For furnishing all material and equipment and performing all labor necessary to install water distributing system in accordance with Field Drawing No. 601-R with Revision A, dated May 12, 1941, instead of as shown on Contract Field Drawing No. 601-R, dated March 27, 1941. The work to include all fittings and accessories that are required to leave the system ready for satisfactory operation and all work shall comply with the provisions of Specification No. Fort Lewis—32.

Additional \$ 2,856.47

Total Additional \$25,998.47

the contract price in accordance with Article 3 of the general provisions of the Contract is hereby increased by the sum of Twenty Five Thousand Nine Hundred Ninety Eight Dollars and Forty Seven Cents (\$25,998.47). This change in contract price

(Testimony of Eivind Anderson.)

extends the time of completion seven (7) calendar days.

In the preparation of your requests for payment, notation should be made thereon of the amount, date and designating letter of this Change Order, which increases by the above sum the total amount of your contract.

Very truly yours,

C. M. CLIFFORD

C. M. Clifford

Capt. Q. M. C.

Executive Officer

Contracting Officer, (Authority-Letter O. Q. M. G.
June 5, 1941)

Approved By Authority of The Quartermaster
General

BREHON SOMERVELL,

Brehon Somervell

Brig. Gen. U. S. A., Chief of Construction Division.

The supplies and services to be obtained by this instrument are authorized by and are for the purposes set forth in, and are chargeable to Procurement Authority QM 7546 A 0540-12, C. of R. U. & A. 1941-42.

P 1-3211 (P 1-32) \$23,142.00

P 1-3213 (P 21-32) \$ 2,856.47

\$25,998.47

There is a sufficient available balance under the

(Testimony of Eivind Anderson.)

Procurement Authority and Purpose Numbers shown above to cover the cost of this Change Order.

E. P. ANTONOVICH

E. P. Antonovich,

Lt. Col., Q. M. C., Constructing Quartermaster.

[Endorsed]: Filed Apr. 12, 1944.

Redirect Examination

By Mr. Peterson:

Q. Mr. Anderson, there has been evidence introduced in here I think as to change orders made by the government on this entire project. How many official change orders were there—I mean, with reference to letters?

A. Letters, instructing the work to proceed or to be accepted?

Q. No, I am talking now, Mr.—in your final accounting with the government they set up accounting by change orders, do they not?

A. That is right, yes. Yes, I understand.

Q. And change order A-3, introduced in evidence here which I think they said was prepared in April, or in May, do you happen to have that change order A—

Mr. Evenson: That is 26.

Mr. Peterson: 26. That is Plaintiff's 26?

Mr. Lycette: Yes.

(Testimony of Eivind Anderson.)

Q. Showing you Plaintiff's Exhibit 26, that is change order—

A. This is marked change order A, increase.

[544]

Q. And when is that dated?

A. That is dated May 23, 1941.

The Court: That change order A deals with the heating plant and power plant?

A. And the water distribution system. There is two items.

Mr. Peterson: And they deal with extensions of time.

Q. Mr. Anderson, showing you Defendant's A-29, I will ask you what that is?

A. That is the letter by which they submitted this change order to me.

Q. And what is the date of that?

A. September 6, 1941.

Q. I will ask you if by that time the work covered in there had been done?

A. Yes, it had all been done.

Q. Those change orders, Mr. Anderson, are they on the question of accounting or—they have nothing to do about progressing with the work, is it?

Mr. Lycette: I object to it on the ground that is testifying yourself. It speaks for itself.

The Court: Oh, he may answer.

A. That is on the question of accounting, when the finance officer might issue a voucher for the payment of this, so it is strictly a question of accounting.

(Testimony of Eivind Anderson.)

Q. All right. Showing you this—there was a change order also, B?

A. Yes, there was one "B".

Q. And what did that cover? [545]

A. Well, that covered a number of miscellaneous changes that were made during the construction of the work and ordered by the constructing quartermaster.

Mr. Lycette: May I ask if that has anything to do—it has nothing to do with any item here in controversy?

Mr. Peterson: No, I am just showing the letters, but I am showing these things came four or five months after the work was completed.

Q. When was change order "B" issued?

A. It was submitted to me by letter of February 5, 1942.

Q. You had been off the job for a considerable time by that time?

A. Oh, I closed the job long before that, yes.

Q. All right—

Mr. Peterson: We offer those in evidence. They are just a matter of explaining—

Mr. Lycette: I have no objection.

The Court: Admitted.

(Whereupon documents referred to were received in evidence and marked Defendants' Exhibits A-29 and A-30, respectively).

(Testimony of Eivind Anderson.)

DEFENDANTS' EXHIBIT No. A-29

September 6, 1941

400 Bed Hospital & Misc. Bldgs.

Serial Letter No. 119

Mr. Eivind Anderson,
517 North I Stret,
Tacoma, Washington

Subject: Change Order "A"—Increase.

Dear Sir:

Inclosed herewith will be found Change Order "A", approved, which increases your contract price for construction and completion of 400 Bed Hospital & Miscellaneous Buildings, Fort Lewis, Washington, by the sum of Twenty Five Thousand Nine Hundred Ninety Eight Dollars and Forty-Seven Cents (\$25,998.47).

This change in contract price extends the time of completion Seven (7) calendar days.

Very truly yours,

ADELLON H. HOGAN,

Captain, Q.M.C., Assistant

1 Incl.

Contr's No.

Change Order "A".

Q. And Mr. Anderson, showing you Defendants' A-31. Mr. Anderson, what is that?

A. That is entitled Contractor's Change Order 3.

(Testimony of Eivind Anderson.)

Q. All right, and Mr. Anderson, when was that delivered to you?

A. It was delivered by this letter marked—let's see, now. It was delivered to me I recall in April, late April of '42. About the 28th of April. [546]

Q. Showing you, Mr. Anderson, Plaintiff's Exhibit 28, what is that? I think you testified concerning it.

A. That is the master sheet of my—of my estimate or bid to the government in this contract.

Q. And that was the breakdown of your bid to the government? [548]

A. Yes, that is my own breakdown—my own computation for myself, see?

Mr. Peterson: Yes, all right. We offer that in evidence.

Mr. Lycette: I object to that on the ground it is of no material value whatever. I asked for his working sheet and he brought this out.

Mr. Peterson: You asked for his master bid.

The Court: Of course, that is not his bid. That is his master, taken from his work sheets. That will be admitted in evidence.

Mr. Peterson: That shows the items.

The Court: When was it prepared?

A. That was prepared prior to the bidding of April 8th.

The Court: How long?

A. Oh, about a day before, I would say, about the 7th, would be about as early as I could give it.

(Testimony of Eivind Anderson.)

The Court: How long had you been figuring on this contract?

A. About three weeks.

(Whereupon document referred to was received in evidence and marked Plaintiff's Exhibit No. 28.)

Builders Hardware

Brick Work

Sheet metal work

Roofing

Millwork

Extreme Sliding Dr.

Pumbing

Plumbing & Heating syst.

Electrical Wire & Elec. Dist.

Kitchen Equipment

Sewer & water Dist. syst.

Concrete & Cement work

Acoustation

3887 00

11,500 00

9,685 00

10,837 00

47,900 00

5,999 00

29,134 00

2,866 00

4,100 00

935 00

37,000 00

59,190 00 *

7,365 00

569,704 00

3/4 in. proof
Nails K.W.S.

\$ 762

Subj. on
Millwork - 70

1558.50

12,000

129,384

Total

849,378 -

Bond, Taxes, Social sec, Am. S. H. Imp. 11%

95,433 00

942,811 71

634 *

936,517 -

Reduced from above

200

April 8-1941

(Testimony of Eivind Anderson.)

The Court: How long had you been figuring on this contract?

A. About three weeks.

(Whereupon document referred to was received in evidence and marked Plaintiff's Exhibit No. 28.)

APR 13 1934

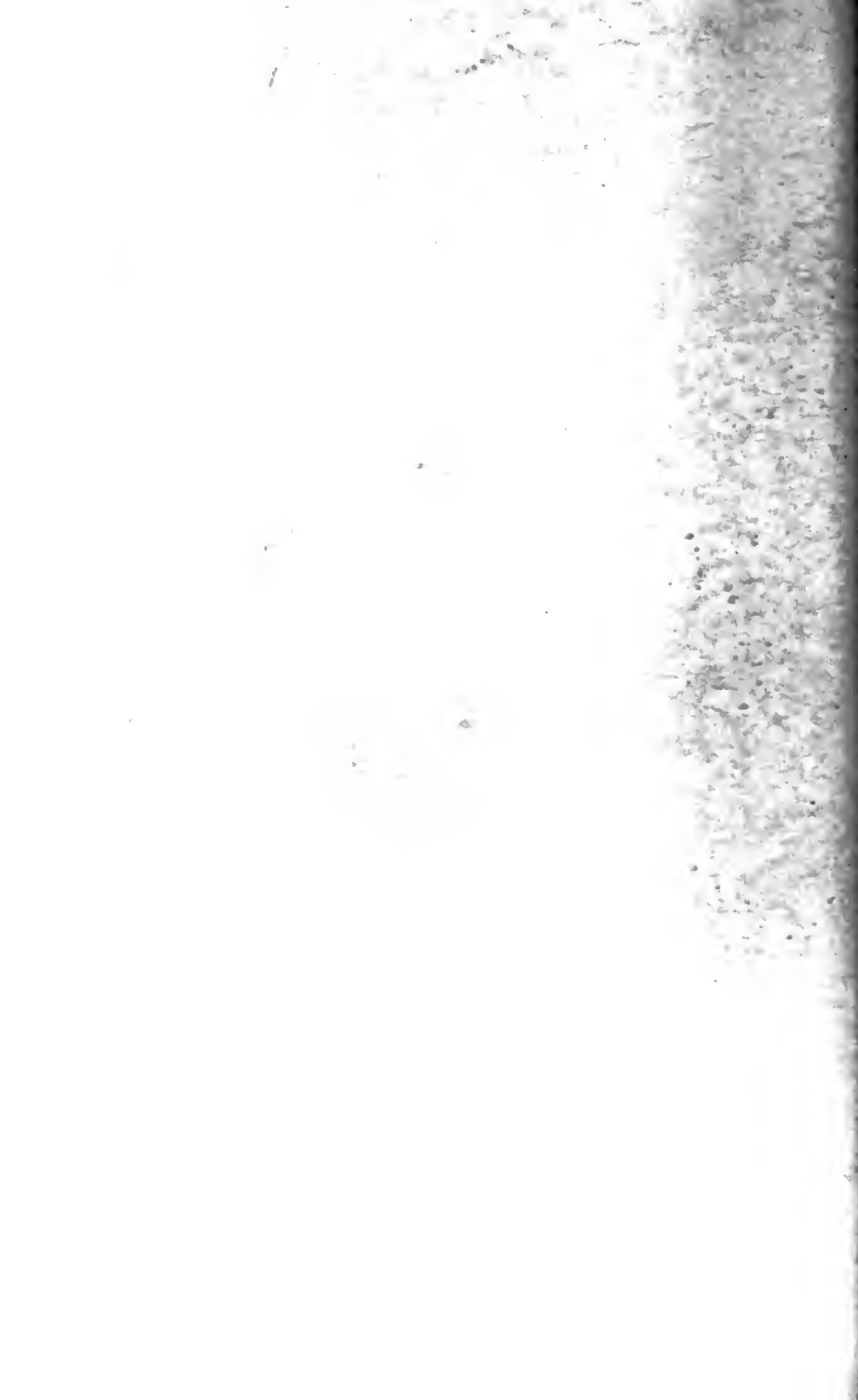
Foot Curs 400 Bed Hospital & Miscellaneous Buildings

Carpentry & Framing:

| | | | |
|------------------------------|---------------------|----------------|----------|
| Iron pit & Runway | Quantity | Price per unit | Amount |
| Foot etc. | 670,000 SF @ 2 1/2¢ | 18,760 | 17,420 |
| Ceiling wood roof ties | 50,000 " | 26 1/2¢ | 14,300 |
| Rafters, Roof beams, etc. | 127,000 " | 28 1/2¢ | 35,536 |
| All studs & partitions | 280,100 " | 28 1/2¢ | 8,400 |
| Plates & Girts | 202,100 " | 24 1/2¢ | 5,252 |
| Cross bracing | 107,000 " | 24 1/2¢ | 2,782 |
| Brns., Floor Joists & Beams | 40,000 " | 24 1/2¢ | 920 |
| Plank floors, Schedules | 15,000 " | 24 1/2¢ | 390 |
| Joists | 18,000 " | 24 1/2¢ | 430 |
| Roof & Slop. Sheathing | 18,000 " | 24 1/2¢ | 430 |
| Water Tables & Misc. | 13,500 " | 24 1/2¢ | 328 |
| Slings - (18¢) | 16,000 " | 49 1/2¢ | 640 |
| Corner Brnds. | 60,000 " | 14 1/2¢ | 600 |
| Wood Joists - (59¢) | 10,000 " | 15 1/4¢ | 1,500 |
| Sheathing paper, (10¢) | 157,000 " | 69 1/2¢ | 12,500 |
| Stud - (10¢) | 1200 " | 17 1/2¢ | 200 |
| Cyple siding | 302,000 AF | 49 1/2¢ | 12,980 |
| Anderson Mill boards | 225,000 SF | 31 1/2¢ | 6,300 |
| 1/2" Suction board | 686,000 " | 27 1/2¢ | 18,549 |
| 1" " | 37,000 " | 32 1/2¢ | 1,184 |
| Imp. Office of Slop. Sheath | 13,000 " | 51 3/4¢ | 680 |
| Chorit form lumber | 50,000 SF | 22 1/2¢ | 1,125 |
| Miscellaneous Carpentry: | 2,400 sq ft | 32 1/2¢ | 770 |
| 12 Building Cellars: | 667 - 432 1/2¢ | 10,150 | 11,714 |
| 17 Corl. Doors | 612 - 204 1/2¢ | 120 | 600 |
| 8 garage Doors | 618 - 144 1/2¢ | 88 | 540 |
| 590 Ceiling Scaff. | 610 - 870 1/2¢ | 528 | 990 |
| 700 kg. Scaff. | 610 - 1432 1/2¢ | 860 | 990 |
| misc. Bolt & nuts | 250 " | 250 | 62 |
| Structural & ornamental Mill | 670 " | 670 | 610 |
| Builder Hardware | 3887 " | 3887 | 870 |
| Black Work | 1,800 " | 1,800 | 12,000 |
| Sheet metal work | 7685 " | 7685 | 127,377 |
| Roofwork | 10,837 " | 10,837 | 18,000 |
| Millwork | 47,700 SF | 47,700 | 1,525.00 |
| Plumbing & Heating | 5,999 " | 5,999 | 18,000 |
| Electric Work (See. Dept) | 2,819 SF | 2,819 | 84,938 |
| Kitchen Equipment | 4,100 " | 4,100 | 78,933 |
| Stairs with Balustrade | 7,350 " | 7,350 | 942,231 |
| Carpet & Cement work | 87,000 SF | 87,000 | 6,284 |
| Paintwork | 50,190 " | 50,190 | 956,517 |
| Construction | 7,865 " | 7,865 | 1,574 |
| | 66,745 " | 66,745 | 1,574 |

PAUL P. O'BRIEN, C. P. R. K.
 DEC 13 1934
 UNITED STATES COURT OF APPEALS
 FOR THE NINTH CIRCUIT
 FILED

849,378 -
 78,933 -
 942,231 -
 6,284 -
 956,517 -
 1,574



(Testimony of Eivind Anderson.)

Q. Mr. Anderson, showing you Plaintiff's Exhibit No. 8, which is the offer from Mr. Rushlight on May 9th, concerning the word "revised", there—

A. Yes.

Q. Mr. Anderson, that word "revised" had appeared in the various letters prepared by Mr. Rushlight here, and in the original letter calling for revision from the govern- [549] ment—

A. Uh-huh.

Q. I will ask you if that term was used in any other dealings between you and Mr. Rushlight?

A. No, no. That of course alludes to that revision of the boiler house that we were bidding on.

Q. And was there anything else the revision could refer to?

A. No, no, that would be the only thing.

Q. Mr. Anderson, when Rushlight—I believe it was testified, assisted in the preparation of this revision, so far as the boilers were concerned, did he?

A. Yes, he consulted with me on that on one occasion.

Q. Is it customary for subcontractors to do that with the contractor in figuring bids or estimates?

A. Oh, they always contact the general contractor to assist them with figures if they are in any way interested, or expecting to get the work from him.

Q. At the time in April, 1941, Mr. Anderson,

(Testimony of Eivind Anderson.)

do you know of your own knowledge whether Mr. Rushlight had other work at Fort Lewis?

A. Yes, I knew he was doing some repair work down there. He told me so. [550]

Recross Examination

By Lycette:

Q. Do you recall showing your general bid sheet—your master bid sheet to Mr. Rushlight in the Winthrop Hotel in Seattle prior to the time of the bid opening?

A. Never. I was not in Seattle, at all.

Q. I meant Tacoma.

A. Not in Tacoma. I did not show it to Rushlight at any time.

Mr. Lycette: That is all.

Redirect Examination

By Mr. Peterson:

Q. Did anybody see your bid before it was opened out there? A. This bid?

Q. The bid that you made.

A. The figures, no. Nobody knew those figures. Nobody saw this bid sheet but myself. It was my secret—my bid.

Mr. Peterson: Your Honor please, one other item.

I understand, Mr. Lycette, it is stipulated that no interest, if Your Honor please, is to be charged on any items prior to the December 10, 1942.

Mr. Lycette: That is right.

Mr. Peterson: December 10, 1942.

The Court: I wanted to ask Mr. Anderson a few questions if you are through.

(Testimony of Eivind Anderson.)

Now, Mr. Anderson, apparently from the testimony as it has gone along, both yours and Mr. Rushlight's differences arose between the two of you, irrespective of what the basis of such differences were, very early in [555] your dealings.

A. Yes, I would say it did, because,—for many reasons.

The Court: I do not care for the reasons, but there were differences—that is, you and your sub-contractor were not in perfect harmony during the progress of this work.

A. No, that is true to some extent. There was discontent about payment and about progress and various things like that.

The Court: And as the work progressed, and as time went on, was there more or less harmony as between the two of you?

A. Well, I would say it probably hadn't increased—the harmony did not increase—rather decreased if there was any change in it.

The Court: Now, how many other sub-contractors did you have besides the Rushlight people?

A. Oh, I must have had about ten or twelve.

The Court: According to this master sheet, you had one on painting, did you? A. Yes.

The Court: And then you had one on electrical work? A. Yes.

The Court: And one on kitchen equipment?

A. Yes.

The Court: One on sewer and water distribution system? A. Yes. [556]

(Testimony of Eivind Anderson.)

The Court: And one on concrete, and some kind of—concrete and some other work.

A. On brickwork.

The Court: It looks like cement work.

A. I don't believe there was a sub-contract on that calculated in there.

The Court: Do you have one on excavation?

A. Well, that is direct items—items that I expected to take care of direct—by direct operation.

The Court: But you had one on painting?

A. Yes, I had one on painting.

The Court: Well now, before you made up this bid did you detail the painting work, or did you have some man experienced in that work give you his estimate?

A. Well I did have figures that was submitted, of course. I always make my own analysis of it. I don't take those figures as they come. They are erratic. Sometimes those figures are very erratic.

The Court: On April 7 when you made up this master sheet, had you had a set of figures from more than one man what the painting would cost you?

A. Yes.

The Court: From more than one?

A. Yes, I think there was three or four painters that submitted figures there.

The Court: Do you recall if you let the painting on the figure that you put in on preparing your bid of twenty-nine thousand?

A. I could say if I see that.

(Testimony of Eivind Anderson.)

The Court: It is right at the bottom, twenty-[557] nine thousand some dollars.

A. I think that was very close, in that line.

The Court: Now, did you have more than one figure on the plumbing and heating? It seems to have been about thirty-three or thirty percent of the contract.

A. I recall during that time that there was telephone calls submitting figures on plumbing and heating, and I think I might have had two or three of those.

The Court: Do you remember what range they took?

A. Well the range they took was around two hundred and eighty-nine. I think that was the highest I had. Then the range dropped below two hundred and eighty on some parties that I did not have a great deal of knowledge about.

The Court: Did the Rushlight people figure on the telephone? Did they submit you a telephone figure?

A. I have no record of that, whatever.

The Court: Do you have any recollection?

A. No, I have no recollection. I do recall—I believe it is possible. Now I can't say that I actually recall that there was a 'phone call from Rushlight stating that he would have a figure—that he would have a figure, but I have no recollection whatsoever that he submitted anything in the line of a fixed figure, neither by letter or by telephone.

(Testimony of Eivind Anderson.)

The Court: Well, of course before you submitted your bid—your master bid to the government, you had to be quite well assured that these sub-contracts particularly [558] the larger ones, were going to come within a given figure, otherwise it might be disastrous to you.

A. Of course I naturally have to rely on some of this experience and knowledge of those things, and took a chance. That goes with it, but that is the natural procedure, to have some approximate figure, at least.

The Court: Did you, after you submitted your bid and the bids were opened on the 8th of April, did you consult any of these other bidders for the plumbing and heating?

A. Prior to the bid?

The Court: No, after they were opened?

A. No, I did not.

The Court: It was evident that you had the low bid?

A. No, I did not consult any of them.

The Court: Now about the electric, did you have more than the one bid on that, that forty-one thousand dollar item?

A. Yes, absolutely. That bid was from the Holert Electric and Wire Electric, and many of those electrical firms, that is generally submitting tenders in those biddings.

The Court: Well, when a contractor that carries on work of the magnitude that you do and is undertaking a million dollar contract as here in-

(Testimony of Eivind Anderson.)

volved, and you start figuring on it and you make up your mind what you are going to sub on your contract—I assume that you are going to do so much with your own crew and so much [559] with your own men, and you are going to sublet certain parts of it,——

A. You do that ordinarily just after you have had the contract. As a whole, I don't make up a specific list of that in bidding jobs because those things can be arranged, naturally, afterwards, whatever becomes practical in cases. Of course in cases a contractor might receive a bid from a sub-contractor that does not prove to be responsible, and may not be able——

The Court: But on a job of this kind you don't keep a crew that are equipped and trained to do painting work on a large scale. You have to recruit such a crew, would you not?

A. That is the practical thing.

The Court: And on heating and plumbing you would have to recruit such a crew, apparently?

A. Yes, sir.

The Court: And apparently on concrete and cement work?

A. No, that becomes more or less detailed work. That is handled by the contractor's crew, himself, carry that out.

The Court: In other words, what I am trying to find out about your practice generally in this big contract here, in 1941 this was a large contract—since then it is a minor contract, but before you

(Testimony of Eivind Anderson.)

decided to bid, either solicit from smaller contractors who were engaged in specialty fields their estimate, or they voluntarily gave them to you?

A. They volunteer, Judge, their estimate, those [560] people who are interested in those kinds of biddings, generally obtain plans from the government and prepare their bids well in advance, and then if they want to submit a figure, they generally contact a contractor interested in the bidding and either call them up or send them a letter.

The Court: And they sometimes submit their estimates to a number of contractors applying for the job?

A. Oh, yes, oh, yes.

The Court: And of course the successful contractor then attracts the attention of all of them, I suppose?

A. That is right.

The Court: When he is announced as the successful contractor?

A. That is right.

The Court: Now who was the fellow that was nearest to you on this contract?

A. I think there was two other concerns that was very close. Now I wouldn't be able to say whether it was Sound & Cluett Construction Company or Bergeson & Bailey. Those were the bidders that was closest in the competition.

The Court: How near were they?

A. Oh, they were rather close. Just a matter

(Testimony of Eivind Anderson.)

of a couple or three thousand dollars, I would say—something like that.

The Court: Well, when the bids were opened, of course then everybody that was interested was entitled [561] to know what everybody else had bid?

A. That was as far as the lump bid was concerned, but not the sub-bids.

The Court: I mean the lump bids.

A. That was a public bidding.

The Court: And there was only about three thousand dollars difference between your bid and the next above bid?

A. I think so. I don't think there was any more.

The Court: Well, when did you hear—the Colonel testified here yesterday at that time or a time soon thereafter that he was not going to recommend you for the bid.

A. I heard him say that here.

The Court: Did you hear him say it down there?

A. No, he did not say anything like that to me down there. He in fact advised me when I inquired, that he was not recommending anyone in particular—he left that recommendation to the higher-ups, he was only supposed to gather information to whatever was practical and send it to the awarding officials.

The Court: Now this was, as I understand, one of these unusually hurried jobs that was to be done.

A. In 90 days.

(Testimony of Eivind Anderson.)

The Court: Very rapidly.

A. 90 days.

The Court: And you and the other contractors were deeply concerned when the award would be made—this was the 8th of April. Now, when did you hear from [562] it again?

A. Well I didn't hear from it until I contacted Washington.

The Court: But weren't you making contact out at Fort Lewis to see what they were going to do?

A. Only two or three days—two days after the opening of the bid I made a trip out there.

The Court: Who did you see, the Colonel?

A. Colonel Antonovich.

The Court: What did he tell you then?

A. He told me that he was not recommending, he did not know who would get the contract, and those bids, he said, had to be analyzed by the higher-ups and then he would get his instructions. Now of course that is the way he explained it to me. I didn't take altogether full credit to it. I thought he might have a hand in the recommendation.

The Court: You heard his testimony yesterday?

A. Yes, I heard it. Now he did not explain it to me that way.

The Court: And now when was it, on the 12th of April that you started back to Washington?

A. Yes, about on the 12th. I had had a communication with Coffee and asked him to contact

(Testimony of Eivind Anderson.)

the War Department down there and he reported back that he had not been able to find out anything, and I think he suggested it might be well for me to come back there and sort of stick around and watch the thing. Every contractor seemed to do that at that time that was expecting to get work from the government. [563]

The Court: Well, were your sub-contractors pretty active too during that time, the fellows that made offers to you?

A. No, they did not know who was going to get the job. They thought somebody else might get it and they wouldn't open up on me just what they would do. That wouldn't help the situation any or the chances of getting work, they were simply waiting to see what happened—who got the contract and then of course they would be interested in contacting him and getting work.

The Court: Well, there wasn't any question about your bid being the low bid?

A. No, there was though, this question. As I recall it there was a chance that the bid might be divided two ways, and if that was the case then I was in the—was not the low bidder in this setup of alternate bidding, you know. They could take one part of the contract and award it to another bidder. If they put it together I would be low.

The Court: Were you going to go back to Washington on this contract and see what you could do and what arguments you could advance and what

(Testimony of Eivind Anderson.)

influence you might use to see it was awarded to you, irrespective of the telephone call you got from Moscow, Idaho?

A. Yes, sir.

The Court: When were you planning on starting?

A. Well I was planning on starting about the 12th of April, just about when I did start—at the time I did start, so this telephone conversation happened to come in before. I already made my arrangement and it came [564] in before I left, of course, but I already made my arrangements at the time to go.

The Court: Well, if you concluded you might receive some aid through your congressman by making appointments for you and contacts for you, wouldn't you be persuaded that if someone could get a senator to do that that would be helpful too?

A.—I don't know. It of course would not detract from it. I wouldn't have any specific objection to it if somebody had something like that to present. That of course—it wouldn't at any rate persuade me to make the trip for that purpose to get a special senator to do that.

The Court: I think that is all, unless that suggests, Mr. Peterson, anything further.

Mr. Lycette: I might ask one question in view of what Your Honor said.

(Testimony of Eivind Anderson.)

Recross Examination

By Mr. Lycette:

Q. Mr. Anderson, the bid that goes into the government is not in the form at all of what is contained on your master sheet there?

Mr. Lycette: I don't know what that number is.

The Court: 28, I think it is. Yes.

Q. (Continuing): Exhibit 28.

A. Well, you got the form of bid.

Q. I am asking you.

A. This is not the government bid form.

Q. Your bid went in just in a lump sum, did it not? [565]

A. Well, just the way it is set up there. I think I have the original bid form here with me, if you would like to see it.

Q. The contract that is Exhibit 1 in the case, item 1, furnishing all material and equipment and performing all labor and material to construct temporary houses—and then it describes the whole job and then ends up “For the lump sum \$936,917.00, that is correct, isn't it?”

A. If you will pardon me, I will get the bid for you.

Q. This is the bid.

A. It is set up in a different form. It takes me longer to analyze it.

The Court: Did you say it was not this form. It was a form there, you just said you would do the job for that sum?

(Testimony of Eivind Anderson.)

A. No, no, it is an extensive form. It is an extensive form.

Mr. Lycette: I am going to come to it next.

Q. Look at that. That is your bid?

A. I don't think so. This is not the type of form that we bid on, I am sure.

Q. Well, look and see. Look it over carefully.

A. No, that is not. That is something else, made up later by the government. If I step down I can find it.

Mr. Peterson: Here is the original.

The Court: While you are looking that up, I want to ask do these sub-contracts that you make, sometimes do you take bonds—do you submit those to the government, too?

A. No. [566]

The Court: The government does not necessarily know who your sub-contractors are?

A. They have a provision in there that I think in this specification, particularly, that they shall approve the sub-contracts. That of course, would be after the contract had been awarded, not before.

The Court: Yes. Well, were they in this case?

A. I think they were. I think they were submitted to the government under those requirements.

The Court: Do you know whether they are in this photostatic copy?

A. I really don't think so. I think they might be in the specification. This is the contract document, itself, and it does not contain that in there.

(Testimony of Eivind Anderson.)

(paper handed to witness) This is the original bid for them——

The Court: That is now Exhibit No. 31?

A. 31.

Q. That is your original bid sheet?

A. Yes, that is the original bid sheet, that is right. That is the way——

Mr. Lycette: Now I would like to offer that in evidence.

The Court: Any objection?

Mr. Peterson: What is the purpose of it?

Mr. Lycette: One purpose I do not want to disclose at the moment. It came up here and I think it is proper.

Mr. Peterson: Let me take a look at it. I haven't even seen it. [567]

Q. While counsel is looking at it I will ask you, Mr. Anderson, you couldn't possibly get that bid information that counsel is looking up off the master sheet that is there, could you, the way it is put in and submitted to the government? It is impossible to do that. Could you?

A. Well, the master sheet as I have explained, is compiled from all the items that goes in there, see, after they have been analyzed they are all put together. They might be spread out into that bid form into various groups, and the style that it is set up, but after it all goes together, it balances up on that master sheet, see?

Q. Let me ask you this way, Mr. Anderson. There was 72 buildings altogether, wasn't there?

(Testimony of Eivind Anderson.)

A. Yes, sir.

Q. And you bid so much per building, don't you?

A. Yes.

Q. That is the way you bid it to the government.

A. You have to break it down to the plumbing and heating and painting and all those various items. That is the way the information was gathered.

Q. That is right. Then you don't use that master sheet at all.

A. I haven't said that I did.

Q. No, you couldn't figure it out.

A. But there is the master sheet that I used in my estimate, that is what I say.

The Court: What I am interested in now, for instance, the item on plumbing and heating. That subcontract was let according to the testimony here and the documents, at a date of course, substantially after the [568] government had told you you had the contract, but when did you notify the government—is there anything in these exhibits that have been offered, or is there anything in your contract with the government that required you to notify them to whom you had let these sub-contracts and the sum for which they had been let?

A. Now, I am a little hazy on that, Your Honor, just how many of those sub-contracts the government wanted me to list.

Q. May I ask you, this, Mr. Anderson. You submit their names but you do not submit the amounts, do you?

(Testimony of Eivind Anderson.)

A. I think there is a requirement as to who those sub-contractors are and I know the plumbing and heating and mechanical contractors' name is required to be submitted.

The Court: But you do not submit the amount?

A. No, just the name—just the name, and I have some letter in there, I recall that, on that transaction.

The Court: That would not be of any help.

A. No, they don't require very much. They want their qualifications and capability to perform.

Mr. Lycette: Have you any objection now?

Mr. Peterson: I don't think so.

Mr. Lycette: If there is no objection to it. That is his actual bid. It came out of your files, did it not, Exhibit 31?

A. That was the bid. That is right.

The Court: Admitted.

(Whereupon document referred to was received in evidence and marked Plaintiff's Exhibit No. 31.) [569]

(Testimony of Eivind Anderson.)

PETITIONER'S EXHIBIT No. 31

Standard Form No. 21

Approved by the President

Fort Lewis - 32

November 19, 1926

STANDARD GOVERNMENT FORM OF BID
(Construction Contract)

(Place) Tacoma, Wn.,

(Date) April 8, 1941.

To: The Constructing Quartermaster
Fort Lewis and Vicinity
Fort Lewis, Washington

In compliance with your invitation for Bids dated March 5, 1941 and subject to all the conditions thereof, the undersigned Eivind Anderson, a corporation organized and existing under the laws of the State of.....
a partnership consisting of
or a individual trading as Eivind Anderson of the city of Tacoma, Wn., hereby proposes to furnish all labor and materials and perform all work required for the

Construction and Completion of
Temporary Housing
400 Bed Hospital

Steam Distribution System for Hospital
Sanitary Sewerage System
Water Distribution System
Electric Distribution System

at

Fort Lewis and 41st Division Cantonment
Washington

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)

in strict accordance with Specification No. Fort Lewis-32, the Schedules included and the drawings mentioned therein, for the following considerations:

Item 1: I (We) propose to furnish all material and equipment and perform all labor necessary to construct and complete, ready for use, the Steam Distribution System, Sanitary Sewerage System, Water Distribution System, Electrical Distribution System and Temporary Housing and 400 Bed Hospital, consisting of the following buildings, and designated as Group A: Sub-items 1 to 31, incl.

Group A.

1. Barracks (63 men)—(7 Buildings) Ft. L.
2. Storehouse & Co. Admin. (SA-2)—(1 Building) Ft. L.
3. Quarters, Regt. Comm. (Q-9)—(9 Buildings) 8 Ft. L., 1-41st.
4. Post Exchange (E-3)—(3 Buildings) Ft. L.
5. Recreation (RB-1)—(1 Building) Ft. L.
6. Theatre (1038 Seats TH-3)—(1 Building) Ft. L.
7. Storehouse (Warehouse) (SH-13)—(6 Buildings) Ft. L.
8. Storehouse (Warehouse Insul) (SH-18)—(1 Building) Ft. L.

Total—29 Buildings.

BF-1

(Revised 3-12-41)

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)

400-Bed Hospital at Fort Lewis consisting of:

9. Administration (A-3)—(1 Building)
 10. Officers or Nurses Quarters (HQ-24)—(3 Buildings)
 11. Hospital Quarters & Mess (HQM-20)—(1 Building)
 12. Hospital Quarters & Mess (HQM-13)—(1 Building)
 13. Barracks Med. Det. (HB-54)—(4 Buildings)
 14. Recreation Building (A-5)—(1 Building)
 15. Mess Med. Det. (M-6)—(1 Building)
 16. Clinic (C-1a) Combination—(1 Building)
 17. Clinic (C-3b) Comb. & Surgery—(1 Building)
 18. Dental Clinic (DC-2)—(1 Building)
 19. Ward Std. (W-1)—(9 Buildings)
 20. Ward, Combination Std. (W-2)—(4 Buildings)
 21. Ward, Detention (W-8)—(1 Building)
 22. Mess E.M. Patient (M-16)—(1 Building)
 23. Infirmary (I-2)—(1 Building)
 24. Storehouse MD W/Dis. (SH-6)—(1 Building)
 25. Storehouse MD W/Shelter (SH-7)—(2 Buildings)
 26. Morgue W/4 Mort. Compartments (MO-2)—(1 Building)
 27. Boiler House (HBH-13)(1 Building)
 28. Open and Enclosed Covered Walks (See Drwg. No. 700-247 Rev. A & B No. 700-247.1)
- Total—(36 Buildings)

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)

29. Dental Clinics (DC-1)—(2 Buildings) 1 Ft. L.,
1 - 41st.

30. Guest Houses—(2 Buildings) 1 Ft. L., 1 - 41st.

31. Service Clubs—(3 Buildings) 2 Ft. L., 1 - 41st.

Total—(7 buildings)

Total Group A—(72 Buildings)

and including the utilities thereto, at Fort Lewis
and 41st Division Cantonment, Washington

For the sum of: Nine Hundred Thirty Thou-
sand Five Hundred Seventeen Dollars (\$96,-
517.00)

Item 2: In the event sub-items 1 to 8 inclusive
(total 29 buildings) are omitted, deduct from Item
No. 1, the sum of: Two Hundred Sixteen Thousand
Eight Hundred Nineteen & no/100 Dollars (\$26,-
819.00)

Item 3: (a) If one or more Barracks (63 men)
are added, add to Item No. 1 for each building, the
sum of: Seventy Eight Hundred Forty Three &
no/100 Dollars (\$7,843.00).

(b) If one or more Barracks (63 men), not ex-
ceeding seven, are omitted, deduct from Item 1,
for each building omitted, the sum of: Seventy
Four Hundred Dollars (\$7,400.00).

(c) If one or more Storehouses and Company
Administration (SA-2) buildings are added, add to
Item No. 1, for each building, the sum of: Twenty
One Hundred Twelve Dollars (\$2,112.00).

(d) If one Storehouse and Company Adminis-

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)
tration (SA-2) Building is omitted deduct from Item No. 1 the sum of: Nineteen Hundred Fifty Dollars (\$1,950.00).

BF-2

(Revised 3-27-41)

(e) If one or more Quarters Regt. Com. (Q-9) are added, add to Item No. 1, for each building, the sum of: Twenty Two Hundred Fifty Eight Dollars (\$2,250.00).

(f) If one or more Quarters Regt. Com. (Q-9), not exceeding nine buildings, are omitted, deduct from Item No. 1 for each building omitted the sum of: Twenty One Hundred Dollars (\$2,100.00).

(g) If one or more Post Exchange (E-3) Buildings are added, add to Item No. 1, for each building, the sum of: Eighty Two Hundred Fifty Four Dollars (\$8,254.00).

(h) If one or more Post Exchange (E-3), not exceeding three buildings, are omitted, deduct from Item No. 1 for each building omitted, the sum of: Seventy Eight Hundred Sixty Dollars (\$7,860.00).

(i) If one or more Recreation (RB-1) buildings are added, add to Item No. 1 for each building, the sum of: Seventy Eight Hundred Twenty Six Dollars (\$7,826.00).

(j) If one Recreation (RB-1) building is omitted, deduct from Item No. 1, the sum of: Seventy Five Hundred Twenty Dollars (\$7,520.00).

(k) If one or more Theatres (TH-3) are added, add to Item No. 1, for each building, the sum of:

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)

Forty Five Thousand Three Hundred Thirty Dollars (\$45,336.00).

(l) If one theatre (TH-3) is omitted, deduct from Item No. 1 the sum of: Forty Two Thousand Eight Hundred Eighty Dollars (\$42,880.00).

(m) If one or more Storehouses (SH-13) are added, add to item No. 1, for each building, the sum of: Ten Thousand Seven Hundred Thirty Five Dollars (\$10,735.00).

(n) If one or more Storehouses (SH-13), not exceeding six, are omitted, deduct from Item No. 1, for each building omitted, the sum of: Ten Thousand Two Hundred Dollars (\$10,200.00).

(o) If one or more Storehouses (SH-18) are added, add to Item No. 1 for each building, the sum of: Thirteen Thousand One Hundred Fifty Three Dollars (\$13,153.00).

(p) If one Storehouse (SH-18) is omitted, deduct from Item No. 1, the sum of: Twelve Thousand Four Hundred Three Dollars (\$12,403.00).

BF-3

(Revised 3-12-41)

(q) If one or more Dental Clinics (DC-1) are added; add to Item No. 1 for each additional building, the sum of: Sixteen Thousand Seven Hundred Sixty Dollars (\$16,762.00).

(r) If one or more Guest Houses are added: add to Item No. 1 for each additional building, the sum of: Fourteen Thousand Four Hundred Sixty Six Dollars (\$14,466.00).

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)

(s) If one or more Service Clubs are added, add to Item No. 1 for each additional building, the sum of: Thirty Two Thousand Eight Hundred Ninety Five Dollars (\$32,895.00).

Item 4: Unit Prices: The contractor shall submit "Unit Prices" in the following schedule for all items listed below:

These Unit Prices will be used in determining additions to or deductions from the Contract amount when authorized changes in the work as shown on drawings and/or specified are directed. They will apply only when such changes involve materials, specifications, methods and designs the same as those required in like work shown and/or specified. They will not be applied to changes requiring use of materials, specifications, methods or designs of different character from those approved for general use under the contract as originally drawn.

Unit Prices shall include the furnishing of all labor and material, complete in place, unless otherwise noted:

A. Buildings:

1. Earth Excavation, by hand—\$1.07 per cu. yd.
2. Earth Excavation, by machine—\$0.40 per cu. yd.
3. Rock Excavation—\$5.00 per cu. yd.
4. Earth fill under Concrete floors—\$0.60 per cu. yd.

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)

5. Concrete including forms—\$18.00 per cu. yd.
6. Reinforcing steel fabricated and in place—\$110.0 per ton.

B. Boiler House Equipment and Steam

Distribution Systems:

1. 1¼" Standard Steel Pipe, installed—\$0.80 per lin. ft.
2. 1½" Standard Steel Pipe, installed—\$0.83 per lin. ft.
3. 2" Standard Steel Pipe, installed—\$0.90 per lin. ft.
4. 2½" Standard Steel Pipe, installed—\$1.60 per lin. ft.
5. 3" Standard Steel Pipe, installed—\$1.60 per lin. ft.
6. 1¼" Genuine Wrought Iron Pipe, installed—\$0.90 per lin. ft.

BF-4

(Revised 3-12-41)

7. 1½" Genuine Wrought Iron Pipe, installed—\$1.00 per lin. ft.
8. 2" Genuine Wrought Iron Pipe, installed—\$1.25 per lin. ft.
9. 2½" Genuine Wrought Iron Pipe, installed—\$1.50 per lin. ft.
10. 11" Standard Rising Stem Gate Valves, installed—\$10.00 each.
11. 1½" Standard Rising Stem Gate Valves, installed—\$12.17 each.

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)

12. 2" Standard Rising Stem Gate Valves, installed—\$24.00 each.
13. 2½" Standard Rising Stem Gate Valves, installed—\$36.65 each.
14. 1½" Anchors, installed—\$4.10 each.
15. 2" Anchors, installed—\$5.20 each.
16. 2½" Anchors, installed—\$6.70 each.
17. 3" Anchors, installed—\$7.50 each.
18. 1½" Expansion Joints, installed—\$69.10 each.
19. 2" Expansion Joints, installed—\$73.00 each.
20. 2½" Expansion Joints, installed—\$86.50 each.
21. 3" Expansion Joints, installed—\$98.25 each.

C. Water Distribution System

1. 8" Cast Iron pipe installed, including excavation and backfill—One & 95/100 Dollars (\$1.95) per lin. ft.
8. 6" Cast Iron Pipe, installed, including excavation and backfill—One & 45/100 Dollars (\$1.45) per lin. ft.
3. 4" Cast Iron pipe, installed, including excavation and backfill— One & 10/100 Dollars (\$1.10) per lin. ft.
4. 2" Galvanized Wrought Iron Pipe, installed, including excavation and backfill—None & 85/-100 Dollars (\$0.85) per lin. ft.
5. Fire Hydrants, installed, including connection to main—One Hundred Forty Five Dollars (\$145.00) each.
6. 8" Gate Valves installed—Fifty & 50/100 Dollars (\$50.50) each.

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)

7. 6" Gate Valves installed—Thirty Six & no/100 Dollars (\$36.00) each.
8. 2" Corporation Cocks installed—Seven & 50/100 Dollars (\$7.50) each.

BF-5

(Revised 3-12-41)

9. 1½" Corporation Cocks installed—Five & no/100 Dollars (\$5.00) each.
10. Cast Iron Fittings—Sixteen Cents Dollars (\$0.16) per lb.
11. Earth Excavation and backfill (other than above mentioned)—One Dollar (\$1.00) per cu. yd.

D. Sanitary Sewerage System:

1. Earth Excavation and backfill—One Dollar (\$1.00) per cu. yd.
2. Rock Excavation—Ten Dollars (\$10.00) per cu. yd.
3. Fill embankments, in place—Seventy-five Cents (\$0.75) per cu. yd.
4. Concrete (1:2:4) in place including forms—Twenty One & 50/100 Dollars (\$21.50) per cu. yd.
5. Reinforcing Steel in place—Six Cents (\$0.06) per lb.
6. Standard 5 Ft. Manhole in place, with frame and cover—Eighty Dollars (\$80.00) each.
7. Standard Manhole over 5 Ft. in depth, extra depth—Nine & 50/100 Dollars (\$9.50) per foot.

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)

8. Concrete Block Manhole 5 Ft. Depth, complete with frame and cover—Seventy Five Dollars (\$75.00) each.
9. Concrete Block Manhole over 5 Ft. in depth, extra depth—Nine Dollars (\$9.00) per ft.
10. Clay Sewer Pipe, Standard Weight, installed, including excavation and backfill.
 - a. 4 inch—Sixty Five Cents (\$0.65) per lin ft.
 - b. 6 inch—Ninety Cents (\$0.90) per lin ft.

Extra Strength

- a. 4 inch—Seventy Cents (\$0.70) per lin ft.
- b. 6 inch—One Dollar (\$1.00) per lin. ft.
11. Wye Junctions, Standard Clay Sewer Pipe, installed
 - a. 4 inch—One & 10/100 Dollars (\$1.10) each.
 - b. 6 inch—One & 50/100 Dollars (\$1.50) each.

Extra Strength

- a. 4 inch—One & 20/100 Dollars (\$1.20) each.
- b. 6 inch—One & 80/100 Dollars (\$1.80) each.

BF-6

(Revised 3-12-41)

E. Electric Distribution System:

1. Wood Pole, treated, framed and set,
 - a. 25 ft. long—Twenty One & 50/100 Dollars (\$21.50) each.
 - b. 30 ft. long—Twenty-Eight & no/100 Dollars (\$28.00) each.
 - c. 35 ft. long—Thirty & no/100 Dollars (\$30.00) each.

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)

- d. 40 ft. long—Forty & no/100 Dollars (40.00) each.
- e. 45 ft. long—Forty Five & no/100 Dollars (\$45.00) each.
2. Crossarms, wood, with braces, bolts, etc., in place.
 - a. 6-pin 8'0" long (Primary and Secondary)—Five Dollars (\$5.00) each.
 - b. 4-pin 5'7" long (Secondary Service Buck)—Four & 50/100 Dollars (\$4.50) each.
3. Guys with fittings, insulator, etc., completely installed,
 - a. Anchor Guy—Twenty Five Dollars (\$25.00) each.
 - b. Pole Guy—Twenty Six Dollars (\$26.00) each.
 - c. Crossarm Guy — Eighty Two Dollars (\$82.00) each.
4. Insulators, pin type, with pins, in place
Primary and Secondary — Eighty Dollars (\$80.00) each.
5. Insulators. strain type, with clevis, attached to crossarm
 - a. Primary 2300 Volt—Three & 50/100 Dollars (\$3.50) each.
 - b. Secondary—Two & 50/100 Dollars (\$2.50) each.
6. Line wire, M.H.D. Copper, T.B.W.P. in place
 - a. #6 AWG solid—Two & 25/100 Dollars (\$2.25) per 100.

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)

- b. #4 AWG solid—Three & 20/100 Dollars (\$3.20) per 100.
7. Secondary Services, (T.B.W.P., M.H.D. Copper or Type SE Cable, 3-wire, except as noted) including Secondary connection at Pole and Building connection at entrance weatherhead, in place.
 - a. #8 AWG—Thirteen & 50/100 Dollars (\$13.50) each.
 - b. #4 AWG—Twenty Four Dollars (\$24.00) each.
 - c. #4 AWG (4-wire)—Twenty Seven & 50/100 Dollars (\$27.50) each.
 - d. #0 AWG—Forty Four & 50/100 Dollars (\$44.50) each.
 - e. #3/0 AWG—Seventy Two & 25/100 Dollars (\$72.25) each.
8. Secondary Service Rack, on Buildings, additional to that required by interior specifications, in place—Three & 50/100 Dollars (\$3.50) each.

BF-7

(Revised 3-12-41)

9. Transformers, single-phase, with hangers or pole mounting plates, primary fused cut-outs and fuses, ground rod, grounding wire and moulding, installed on pole (2300-115-230 Volt)
 - a. 15 Kva—Two Hundred Seventy Six Dollars (\$276.00) each.

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)

- b. 25 Kva—Three Hundred Dollars (\$300.00) each.
 - c. 37½ Kva—Three Hundred Ninety Dollars (\$390.00) each.
 - d. 50 Kva—Four Hundred Sixty Eight Dollars (\$468.00) each.
10. Pole step installation, completely installed—
Four Hundred Fifty Dollars (\$450.00) each.

The undersigned agrees, upon receipt of written notice of acceptance of this Bid within 15 days (60 days if no shorter period be specified) after the date of opening of the Bids, to execute the Standard Form of Government Contract, in accordance with the Bid as accepted, and give bond, with good and sufficient surety or sureties, for the faithful performance of the contract, within 10 days after the prescribed forms are presented for signature.

Performance will begin within 10 calendar days after date of receipt of notice to proceed and will be completed within specified calendar days from that date. (The words "That date" refer to date of receipt of notice to proceed.)

It Is Hereby Certified that in the event award is made to the undersigned, the unmanufactured articles or materials furnished the United States will have been mined or produced in the United States; and the manufactured articles, materials and supplies will have been manufactured in the United States from articles, materials or supplies, mined,

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)
 produced, or manufactured, as the case may be in the United States, except as noted below or otherwise indicated in this bid. (See "General Conditions" of Specifications).

Date: April 8, 1941.

(S) EIVIND ANDERSON

(Individual or Firm Name)

By

517 N. Eye St., Tacoma, Wash.

(Address)

Before Preparing This Bid the Bidder should read and become acquainted with the following:

A. Government Instruction to Bidders (Construction).

B. U. S. Government Form of Contract (Construction).

Minimum Wage Rates: The hourly wage rates to be paid on the project covered by this Bid shall be not less than the rates established as prevailing and appearing in the schedule in "Special Conditions" of the accompanying specifications.

Penalty For False Certification: Section 35 of the Criminal Code, as amended, provides a penalty of not more than \$10,000 or imprisonment of not more than ten years, or both, for knowingly and willfully making or causing to be made "any false or fraudulent statement * * * or use or cause to be made or used any false * * * account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement * * *

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)
relating to any matter within the jurisdiction of
any Government Department or Agency”.

BF-8

(Revised 3-12-41)

Bidders are hereby notified that Bids submitted
must be accompanied by a statement which shall
include the following:

Whether the Bidder:

- A. Maintains a permanent place of business;
- B. Has adequate plant equipment to do the
work properly and expeditiously;
- C. Has a suitable financial status to meet ob-
ligations incident to the work;
- D. Has appropriate technical experience.

Failure to Fill in all items of Bid and to furnish
all information required in the preceding paragraph
constitutes an incomplete Bid which the Govern-
ment reserves the right to reject.

Envelopes Containing Bids must be sealed,
marked and addressed as follows:

Bids for Temporary Housing, consisting of
400 Bed Hospital and
36 Miscellaneous Buildings
at

Fort Lewis and 41st Division Cantonment
Washington.

To the Constructing Quartermaster
Fort Lewis and Vicinity
Fort Lewis, Washington

(Testimony of Eivind Anderson.)

Petitioner's Exhibit No. 31—(Continued)

To be opened 2:00 P.M., Pacific Standard Time,
March 25, 1941.

Certified a True Copy:

ADELLON H. HOGAN,

Adellon H. Hogan

1st Lieut. Q.M.C.

BF-9

(Revised 3-12-41)

[Endorsed]: Filed Apr. 13, 1944.

Q. You require the plumbing and heating man to break down his bid by buildings too, do you not?

A. They knew those requirements, I did not have to ask them for it. It is self-explanatory in that bid form that it must be done if it is going to do any good.

Q. Well then, when you get a telephone bid on the plumbing and heating where you have to break it down to bid on, how could you possibly break it down in the buildings so as to make up a bid to give to the government, when you get a lump sum over the telephone? How could you possibly do that?

A. Oh, I don't. I just catch you now about that lump sum.

Q. While you are making up your estimate—trying to make up an estimate to the government and make a bid on this contract, how could you pos-

(Testimony of Eivind Anderson.)

sibly use the figures that a sub-contractor could give you over the telephone from Portland, when the government bid requires you to break it up into separate buildings?

A. Of course he has a right to do that over the telephone.

Q. Beg pardon?

A. He has a right to do that over the telephone.

Q. Are you telling us now that you had an oral bid over the telephone, broken down into houses, from Mr. Hasdorff?

A. Items so and so. If you are good at shorthand you can take it down pretty good. I am not very good, but I can take it down good enough if I want.

Q. The other day you said Mr. Hasdorff gave you a lump sum bid.

A. That is right, and set up into various items, and finally itemized it. [570]

Q. Didn't you tell us the other day the bid he gave you over the telephone was a lump sum bid?

A. Lump sum bid for so much money and then itemized so I could make use of it in my bidding if I wanted to use it, and that applies to all other bids like that, you know.

Mr. Lycette: I think that is all.

Redirect Examination

By Mr. Peterson:

Q. Mr. Anderson, on jobs of this character, was it the custom or practice to get these bids over the telephone before——

(Testimony of Eivind Anderson.)

A. It always is the practice. They generally retain their information until the last minute, a few hours before you are ready to close your bid, or come back with the final decision—what you want to finally do. They start something, especially with the plumbing, because they seem to have a lot of rechecking about their figures and it involves a lot of items, and they get their information late from the suppliers and so forth, and so on, and invariably they get their information out the last minute so it is very customary that the telephone bid comes in, and of course it is up to the contractor to accept it or not. If he can rely on those companies that they are responsible, and they will stand by their quotations that are done over the wire—over a telephone, he feels safe in using them.

Mr. Peterson: That is all. [571]

Recross Examination

By Mr. Lycette:

Q. Did you have a last minute bid from Mr. Hasdorff, just the day or hours before you submitted your bid?

A. I am quite sure I did.

Q. Then, after you got his bid did you then in a few hours that were left, break it down and change it around into the form by bidding as you submitted it, to the government?

A. Well, you take that, there is another technicality that comes in again. It would not be wholly essential to break that down into those fine points because we are not wholly concerned about those

(Testimony of Eivind Anderson.)

group bids. If there is a few dollars one way or another, if you get the low bid—lump sum bid those other things, the government does not really go into, you know, so extensively and analyzing by those item bids, which is the low bid for such and such biddings had been deducted or added, and so forth.

The Court: Why didn't you give this other fellow the contract instead of Rushlight?

A. Well—

The Court: He was responsible, wasn't he?

A. Yes, I think he was responsible. I think the real reason he didn't get the contract, he was lax in following up. He did not contact me before—after I had actually got this revision order through, and then of course not having contacted me, I didn't know whether he was really—cared for the job or not, and then I was in a hurry to go. We had 90 days to do this job in and [572] Rushlight was right there willing to go into the job, and I figured there is the best way to do business, let it go right away, I don't think there is much one way or another to lose as far as my price is concerned. I had not gone into those revision items with Mr. Hasdorff, and it naturally would require more days to do that and lose some time in doing it. Now, I reckoned—

The Court: If I remember your testimony right, Mr. Anderson, you did not testify that Rushlight had given you a definite figure before you went out there, before you submitted your bid.

A. No, he was waiting until I had things ready

(Testimony of Eivind Anderson.)

and then he said he would give me a definite figure, the minute he made sure I got the job.

The Court: He did not give you any definite figure at all before your trip to Washington and return?

A. No, he did not.

Mr. Lycette: I haven't anything further.

Mr. Peterson: That is all Mr. Anderson.

(Witness excused.)

Mr. Peterson: Mr. Rushlight, may I ask you a question? [573]

WILLARD A. RUSHLIGHT,

recalled as a witness on behalf of the Defendants, was examined further and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Mr. Rushlight, I will ask you if on or about April 6th or 7th, 1941, if you made an oral bid on this job to Sam Bergesen, a contractor here that bid on this job?

A. I don't remember, I perhaps did, because we put out other bids besides the bid to Mr. Anderson.

Q. And I will ask you whether or not that was over the telephone? A. I don't recall.

Q. Did you ever give any of those bids over the telephone?

A. We have a great many times, yes.

Q. A great many times, and I will ask you

(Testimony of Willard A. Rushlight.)

whether or not your bid to Sam Bergesen on this matter was \$310,000.00?

A. I couldn't say, I don't remember. It might be possible.

Mr. Peterson: It might be possible. That is all.

Mr. Lycette: No questions.

The Court: Well, is it your contention now that you made an oral or written bid to Mr. Anderson before April 8th?

A. Your Honor, Mr. Anderson and I had a definite agreement before he put in his bid.

The Court: I mean before April 8th.

A. Yes, if we would give him a lower price, understand? The general contractor is looking for an advantage in price, but I made a deal with Mr. Anderson I [574] would give him a lower price than we put out generally on the job, and he agreed to give me the job. At that time he showed me his estimate. The lowest price was three hundred and fourteen thousand from a Tacoma firm, and then he used my price of \$300,000.00, and he at that time agreed that that job was mine.

The Court: I think that is now a reiteration of your former testimony.

A. That is the true story of how that thing came about.

Mr. Peterson: That is all.

(Witness excused.)

Mr. Peterson: Offer in evidence, Your Honor please, the Defendants' Exhibit A-1, which was a

letter that has been identified as being from Antonovich to Eivind Anderson under date of December 3, 1941.

Mr. Lycette: I haven't any objection.

The Court: It will be admitted in evidence.

(Whereupon letter referred to was then received in evidence and marked Defendants' Exhibit No. A-1.)

Mr. Lycette: It would probably be wise for both of us to check up and see if we have any unoffered or unadmitted exhibits.

Mr. Peterson: We offer in evidence, if Your Honor please, Defendants' A-2, which is a letter from Eivind Anderson to Colonel E. P. Antonovich. This has been cross-examined on and pertains to the compressors. [575]

Mr. Lycette: I think you will find that is a duplicate copy of one already in evidence.

Mr. Peterson: It was referred to as A-2, and then there won't be any confusion.

The Court: It may be admitted.

(Whereupon letter referred to was received in evidence and marked Defendants' Exhibit No. A-2.)

Mr. Peterson: Offer in evidence Defendants' A-4, plans which——

Mr. Lycette: I haven't any objection.

Mr. Peterson: A-4.

The Court: Admitted.

(Whereupon plans referred to were received in evidence and marked Defendants' Exhibit No. A-4.)

Mr. Peterson: Also A-5, which are also additional plans. Any objection to A-5?

Mr. Lycette: No.

The Court: It will be admitted in evidence.

(Whereupon plans referred to were received in evidence and marked Defendants' Exhibit No. A-5.)

Mr. Peterson: And A-7, the same——

Mr. Lycette: No objection.

The Court: It will be admitted.

(Whereupon document was received in evidence and marked Defendants' Exhibit No. A-7.)

Mr. Peterson: They are all admitted in evidence, then.

The Defendant rests, Your Honor. [576]

WILLARD A. RUSHLIGHT,

recalled as a witness on behalf of the Plaintiff, was examined and testified in Rebuttal as follows:

Direct Examination

By Mr. Lycette:

Q. Mr. Rushlight, did you——

Mr. Lycette: I will try not to repeat, Your Honor——

Q. (Continuing) But did you know Mr. Anderson before some time in April 19—— [605]

The Court: April the 8th.

Mr. Lycette: It is really prior to that.

(Testimony of Willard A. Rushlight.)

Q. (Continuing) April, 1941?

A. No, I never met Mr. Anderson prior to this job.

Q. And where did you—through whom did you meet him first?

A. Through the representative of his bonding company.

Q. And about what date was that?

A. Well it was shortly prior to the date of the opening of the bid on the general contract for the four-hundred bed hospital.

Q. Approximately how long?

A. Oh, it was very shortly before that. It may have been the day before or two days before, Mr. Lycette. I don't recall exactly, but it was very close to the date of the bid opening.

The Court: Mr. Lycette, it would be more helpful to the Court if he would take this Exhibit Number—Plaintiff's Exhibit No. 8, which bears the typewritten date of April the 3rd, and the penned in date of May the 8th, and state whether he met Mr. Anderson or knew of Mr. Anderson at the time that typewritten date appears.

Mr. Lycette: I was going to ask him that.

Q. Did you know Mr. Anderson or see Mr. Anderson prior to the typewritten date that is on that Exhibit 8, April 3rd?

A. No, these bid forms are made up by us and for the bidders on the project. In other words, we get the list of bidders from the government who the contractors are and we pick up plans. They are

(Testimony of Willard A. Rushlight.)

issued to us direct by the government and we prepare a bid and make up these pro- [606] posals to the various contractors and make up various copies of it.

Q. Did you give Mr. Anderson a written bid before the bids were opened on April 8th?

A. Yes, it is my recollection he had a copy of this proposal here.

Q. What amount was in that bid?

A. Three hundred thousand dollars.

Q. After the bids had been opened on April 8th, did you talk to Mr. Anderson on that same day?

A. Yes, I was out, as I recall—him and I drove out to the bid opening together with Mr.—of the Continental Casualty Company.

Q. Following the bid opening did you talk to him? A. Yes, I did talk to him.

Q. And next I will ask you if—

Mr. Peterson: I think, if Your Honor please, we have gone over all that on the other examination.

Mr. Lycette: I am going to try and eliminate as much as I can.

Q. Mr. Anderson testified that a day or two before, I think just the day before April 12th, that you called him from Moscow, Idaho, voluntarily and told him that you had already contacted Senator Holman in Washington, D.C., and found that there he was having trouble—Mr. Anderson was going to have trouble getting his bid. Did you tell him any such thing? A. No, sir, that is not true.

(Testimony of Willard A. Rushlight.)

Q. I will ask you if you did have a telephone conversation with him either on the 12th or the day before? [607]

A. I had two telephone conversations with him on that same day.

Q. Who originated the first call?

A. Mr. Anderson called me on the first call, and I told him that I would call Mr. Hall and see if he could go to Washington to represent us on this matter and that I would call him back, which I did.

Q. In the first telephone conversation which you said was from Mr. Anderson to you, what did Anderson say to you?

Mr. Peterson: Your Honor please, I think we went over all that the other day.

The Court: I think I will let him repeat it, briefly.

A. Mr. Anderson stated to me that he had been advised that—I had told him previously on the day of the bid opening on May 8th which I testified to, that he was not going to be awarded this—directly or indirectly, I don't know which, and he wanted me to assist him through what connections we had to get this job, and I had already in my previous conversation with him on the day of the bid opening, told him that I would be glad to do that because we had an understanding if he got the job that we would get it.

Q. At what price?

A. Yes, and naturally we were interested in get-

(Testimony of Willard A. Rushlight.)

ting the job for us, and in order to do that we were interested in him getting it.

Q. Don't go into too much detail, we want to get over it fast. Now, when he told you that on this first telephone conversation you told him you would call whom? [608]

A. Mr. Hall, C. C. Hall.

Q. And did you tell him who Mr. Hall was?

A. Yes.

Q. And did you yourself at any time tell him that Mr. Hall was Senator Holman's campaign manager? A. No, as I—

Mr. Peterson: We went all through that.

The Court: It was covered. He said he did not, but if he has anything further he wants to say with reference to any statements he contends was made as to Mr. Hall's relationship to Senator Holman—

Q. Did you tell him what relationship if any Mr. Hall had to Senator Holman?

A. Yes, I believe I told Mr. Anderson that to the best of my recollection on the date of the bidding, that Mr. Hall was very close to Senator Holman and I knew him very well myself and I believe if there was any justice to his right to get this job, why, that Senator Holman would be very glad to see that the job would be awarded to the low bidder provided there wasn't something otherwise that I knew nothing about, which of course would make Senator Holman take some other position, in other words.

Q. Then after the first telephone conversation

(Testimony of Willard A. Rushlight.)

on the day before the 12th, or whichever day it was, did you then call Mr. Hall in Portland?

A. Yes, I called Mr. Hall right after Mr. Anderson called me. This was at night, and got him at his residence.

Q. After you talked to Mr. Hall—don't go into what he said, one way or another,—after you talked to him did you then call Mr. Anderson back? [609]

A. Yes, sir, I did.

Q. I will ask you if in that conversation you arranged to meet Mr. Anderson with Mr. Hall in Spokane? A. Yes, sir, I did.

Q. I think you have already testified as to what occurred there, when you got to Spokane. Now Mr. Anderson testified that when you were in Spokane he told you and Mr. Hall that he needed no support from Senator Holman and if you were going back on the basis of—Mr. Hall was going back on the basis of representing him in any way, why he need not go. Did that conversation take place?

A. No, sir, that did not, and that is not true.

Q. I will ask you if in that conversation Mr. Anderson with you employed Mr. Hall to go back?

Mr. Peterson: Just a moment, that calls for a conclusion.

Q. Very briefly, did he ask you—well, tell what he said. I wanted to cut it down. Tell what he said.

Mr. Peterson: I think he has gone into that over and over again.

A. Mr. Anderson and I discussed this arrange-

(Testimony of Willard A. Rushlight.)

ment with Mr. Hall and we agreed between the two of us to send Mr. Hall back there jointly for us to secure the job.

Q. When was that discussion had?

A. In Spokane, and we agreed to each pay half of the expenses and I bought Mr. Hall's ticket for his airplane from Spokane back east and when I talked to Mr. Anderson the night before over the telephone, he had agreed to bring sufficient cash with him so that he would be able to take care of expenses, because I had asked him about [610] that, and at the airport after him and I had a definite understanding we would share expenses, why he then gave Mr. Hall a hundred dollars in cash in advance to take care of his miscellaneous expenses, and I bought his airplane ticket.

Q. Now jumping from that time that Mr. Anderson got back to Tacoma, which I think the testimony shows was some place around the 25th or 26th of April, I will ask you if within a few days subsequent to April 26th, which was the date that the constructing quartermaster sent out his letter asking for figures on a revised power house—if, I am now asking, within a short time, within a day or two after that, if you went to Mr. Anderson and represented to him either directly or indirectly that you were an employee or some way working for the government out at Fort Lewis?

A. I did not at any time.

Mr. Peterson: Mr. Rushlight, he did not so testify, just one of your letters said on behalf of—

(Testimony of Willard A. Rushlight.)

Mr. Lycette: Mr. Anderson testified to that himself.

Q. Now, without going into great detail, did you and Mr. Anderson get together and work out a bid of some kind?

A. Yes, sir, we did. We worked up a completely itemized bid on both his end of the work and mine.

Q. Is that the one that was introduced here as a letter dated April 30th, which contains your letter and Mr. Anderson's letter on the revised power house?

A. Yes, sir, that is the one that Mr. Anderson and I wrote up. [611]

Q. Mr. Rushlight, you went with Mr. Anderson on May 6th out to Fort Lewis to see the constructing quartermaster at the time he was advised that the power house would be according to the substituted plans and specifications, did you?

A. Right close to that date. I believe that date might be the date we went out there, yes.

Q. When you came in, on the way back, I will ask you, if on the way back Mr. Anderson said to you "Now I know I have got the contract, and now I am ready to talk terms with you, and you can give me a bid," or words to that effect?

Mr. Peterson: Just a moment, if Your Honor please. I think it has been repeated and repeated. First Mr. Lycette called Mr. Anderson and he testified to that, and then he called—then Mr. Rush-

(Testimony of Willard A. Rushlight.)

light has been examined on it. I think this about the fourth time we have been at that.

The Court: I do not think this has been covered, Mr. Peterson. Mr. Anderson brought this part of it out. As to what occurred, he gave, but this is in response to it.

Q. Did Mr. Anderson say that?

A. No, that did not occur.

Q. Is it true that up to that time, either at the Fort or on the return to Tacoma on that day, May 6th, that you had given Mr. Anderson no oral or written bid, or ever discussed price for doing this plumbing and heating contract?

A. Certainly we had discussed the price. We orally had [612] agreed that we had the job. That is the reason we were doing all this work and tried to help him get it.

Q. Now, on the 6th or 7th of May, did Mr. Anderson in any way change or renege from what he had previously—

The Court: I think that has been covered.

Mr. Peterson: He has gone over that, Your Honor please.

The Court: Yes, I think it has been covered. I would like, however, for this witness to—at the risk of repetition, state again why he wrote on Plaintiff's Exhibit 8, the word "altered" or "revised".

A. Well, I wrote that on there at the request of Mr. Anderson, and his explanation of that to me at the time was that this was a revised price from our previous understanding, and he wanted the quota-

(Testimony of Willard A. Rushlight.)

tion to show that the price had been revised. I never dreamed he was going to try and construe it as he has done in this trial.

The Court: The previous price was three hundred thousand dollars?

A. Three hundred thousand dollars, that is right. [613]

A. Well, I had an understanding with Mr. Anderson he was to do all the concrete work in the power plant and my understanding with him was that included all foundation work.

Mr. Peterson: I object, to that, Your Honor please. There is a written order from him.

A. Yes, our superintendent did give him a written order without my knowledge, Your Honor.

Mr. Lycette: Nevertheless that order, the testimony shows, came from a superintendent, not from Mr. Rushlight and I want to show why he had a right to object to it.

The Court: I do not think I would take much time with it. [621]

Mr. Lycette: Just one question more. There is one question more, that master sheet which was Exhibit 28.

Q. Now when you were working with Mr. Anderson, did you see his breakdown worksheets at all? A. Yes, sir, I did.

Q. I will ask you if you ever saw that one before the bidding?

A. No, sir, I have never seen this sheet before.

Q. Mr. Anderson did not—

(Testimony of Willard A. Rushlight.)

Mr. Lycette: No, strike that. That is all, you may examine.

The Court: You mean he showed you his working sheets before his bid went in?

A. Yes, he had his working sheets, Your Honor, down to the Olympus Hotel, and when we were discussing this deal, and he changed his figures on his master from three hundred and fourteen thousand to three hundred thousand dollars, when he agreed to give me the job at that price.

The Court: That is before you went down to Fort Lewis and put in the bid?

A. Yes.

The Court: Before the opening of the bid?

A. Yes, sir, I believe that was the evening before the bids were opened.

The Court: You may proceed with the cross-examination.

Mr. Lycette: This will be all my testimony. I will rest as soon as Mr. Rushlight is off the stand.

[626]

By. Mr. Peterson:

Q. On the item of twelve thousand a hundred and eighteen dollars which you have charged for the change in the boiler house and which is covered by your letter to Mr. Anderson of April 30th, which is attached to his signed letter of the same date, I want to ask you if that is a [645] reasonable charge for it?

A. Yes, that is a very reasonable charge. [646]

The Court: Gentlemen, I have tried to follow very closely here. There are so many items in-

(Testimony of Willard A. Rushlight.)

volved and so many controversies that it is impossible for the trier of the facts to say that he is certain that he has made a disposition that is exactly right, or has found the facts exactly as they are, but I have, as we have gone along here through this somewhat extended case, definitely determined as to whether the parties upon whom the burden of proof rested have made proof to a degree that would justify a recovery. I am not going to foreclose you entirely upon that, but I do believe we could expedite the matter, very briefly, if I could point out the items on both sides so whatever argument you want to make you will address on those items that the Court has found against you, rather than devote a great deal of time to arguing on those matters that the Court finds in your favor.

Taking the plaintiffs' Complaint, and before I take it up let me say after argument I shall discuss the items in detail, somewhat, so as to give you my views more fully:

Now in item (b), the Revision of Power Plant for \$12,118.47, the Court finds that the plaintiff has sustained the burden of proof and is entitled to a recovery on that item. [649]

The Court: I am not going to detail at length the reasons resulting in the Court's finding on these numerous items unless there be some particular one or more of them that counsel think it might be helpful to them in case they should want to appeal from the Court's decision.

(Testimony of Willard A. Rushlight.)

I have already indicated before argument what my views were concerning the proof that has been submitted.

I feel that I should say here that counsel upon either side of this case have no reason to chide themselves about not having fully presented their clients' causes. They have made a very thorough and very complete and very [652] comprehensive and a very able presentation of everything that it seems to the Court could possibly be material and an aid in settling these differences. The surprising thing to the Court is that in a contract of the magnitude that this one was—and it is a minor contract compared to those that have come into being in recent months and years, but in 1941 it was considered a very substantial contract—the surprising thing is that men can get along as contractors with their government and sub-contractors with their principals as well as they do, with situations as complicated as are these plans and specifications and drawings, because of necessity they lend themselves to many misunderstandings even when there is a strong desire on the part of every one concerned to harmonize differences and to compromise attitudes.

At the time this contract was first thought of—at the time this plan was first thought of, perhaps I should say, the government was just entering upon a program of expansion for military purposes the like of which had never been dreamed of, and time certainly was the essence of everything that it un-

(Testimony of Willard A. Rushlight.)

dertook, and speed was demanded of every one who was in any way interested in carrying forward such a program. This Court at that time was a member of Congress and participated in these large appropriations that likewise since have sunk into insignificance compared to the appropriations that are being made today.

The contracting business in America as a whole was just coming out of a long period of lethargy and inaction. Contractors were extremely active in the matter of securing government contracts because that seemed to be [653] the only business in the offing and it actually was. Washington, D.C. was crowded as the defendant in this case has indicated, with contractors and their representatives seeking to bring to bear all the influence they could looking toward a contract with the government. In some instances those influences were not what they should have been, and have already been exposed. In most of the cases they were proper and legitimate. There is nothing in this case that would warrant the Court in finding that there were improper pressures brought to bear or there were improper influences at work in the securing of this contract, but the procuring of it in itself resulted in the very situation that we now have to solve here, and it is a background that must be placed into this whole picture in order to see it clearly.

The speed with which the government was executing its contracts both in writing and physically, gave rise to a practice that resulted in field men such as the construction quartermaster on the

(Testimony of Willard A. Rushlight.)

ground being given the power far greater than in normal times, and their finding upon the opening of bids was usually, to all general purposes, a final finding though it had to be ratified formally, later. In this instance it was not such, and at the time in April, 1941 when bids were to be submitted upon this project there were a substantial number of bidders and bidding was not only keen, but a desire to secure the contract of the government was equally keen.

Colonel Antonovich who was the construction quartermaster who testified here, stated that if this contract had followed the course that they normally did at [654] that time, Mr. Anderson would not have been awarded the contract; that his only recommendation was against him. It was not for this Court to make inquiry, and counsel on either side attempted to develop his reasons for it, but at any rate the only possible way that Mr. Anderson could get this contract was through the approval of some superior to the local construction quartermaster, and that was done.

Now from that point on we come to the evidence here that—evidence in sharp conflict. If the Court finds the facts to be as the plaintiff Mr. Rushlight testifies they were, then of course Mr. Anderson has made misstatements that are impossible of belief, and would shake the Court's credibility in his testimony. On the other hand if we adopt the testimony of Mr. Anderson then Mr. Rushlight's evidence and that of his witness Mr. Hall, is not

(Testimony of Willard A. Rushlight.)

worthy of credence. It is therefore necessary that this background picture be given full consideration and that is what the Court has done, and my findings are based largely upon those early transactions between the parties.

I can not find and do not find that Mr. Rushlight submitted to Mr. Anderson on April the 3rd, the date that is involved herein in his submission of the bid, a bid in the sum of either \$300,000.00 or \$314,000.00, \$293,000.00 or even \$286,000.00, but I do find that at some time prior to the submission of the bid by the defendant Anderson to the government he had ascertained from Rushlight as well as other sub-contractors within a reasonable degree of certainty, what this plumbing and heating service would cost him, because it is a special field and he had to rely upon some [655] one to make an intelligent bid to be safe, whatever that was, and the best I could do in the way of a finding is somewhere between \$296,000.00 and \$314,000.00, and it is not so material as is the fact that to Mr. Rushlight, upon the opening of the bids, came a realization that if he secured any part in the performance of this contract it would only be by reason of the fact that Anderson's bid was accepted.

There is no evidence, and the Court sought none, and none was submitted, as to whether Mr. Rushlight was likewise one of the individuals who made a bid for a sub-contract for the same purpose to the man next highest. I shall assume from what took place that he did not.

(Testimony of Willard A. Rushlight.)

I can not find with Mr. Anderson's testimony and upon his contention that he still believed after these bids were opened and for some time thereafter that he was going to get this contract. I must find that he knew very shortly after the opening of the bids that his bid would be rejected, except that it was presented to some one higher in authority than the local construction quartermaster's department, and it was not an unnatural or unusual thing for him to conceive the idea that he had better go back to Washington, and it was not an unusual or an unnatural thing for him to look about to see who might be most helpful in going back there to present this cause. It was quite the natural thing for Mr. Rushlight, who, whether rightly or wrongly, believed that he had certain contacts in Washington that might aid in the presentation of this matter, but of course before undertaking it he would want the assurance that he was going to be given the sub-contract in question, and I therefore find, based upon the testimony of the [656] plaintiff Rushlight, that it was the defendant Anderson who called him some three or four days subsequent to the opening of the bids and suggested that some steps be taken to insure the securing of this contract, and then the second call was made as testified by Mr. Rushlight after contact with Mr. Hall in Portland, and that the meeting in Spokane was not an accidental or incidental meeting, but one which resulted in a prearranged plan. I find nothing reprehensible in

(Testimony of Willard A. Rushlight.)

it, but it was a prearranged plan to go to those higher in authority and there present the reasons why the lowest bidder ought to have this contract, and that Mr. Anderson, together with Mr. Hall, went for a single purpose to Washington, and made such contacts, both, doubtless, were the one with Senator Holman, the other with Congressman Coffee, which in turn resulted in contacts at the War Department with those men who have the responsibility of making decisions, and with such aid and assistance as they could be given from the officers and heads in the Senator's office and in the Congressman's office, were able to present their cause in a manner that carried conviction and persuasion that Mr. Anderson ought to have this contract, and then long before any formal recognition of that fact took place, an assurance was given because of the speed required that Mr. Anderson would have the contract and would come back here, and Mr. Anderson at the same time gave Mr. Rushlight the assurance that he would have the sub-contract.

How just what caused this difficulty to arise after the parties returned to the West is something that is not entirely clear in this record, but at any rate, it is [657] clear to me that Mr. Anderson concluded that those things that transpired between the time that the bid was opened and the time that he left Washington were such that in his own mind, at least, he was satisfied that it was his effort individually and not aided by Mr. Rushlight and Mr. Hall that brought about his securing of this con-

(Testimony of Willard A. Rushlight.)

tract, and that he was not under an obligation to be overly generous in giving a sub-contract for any sum that was greater than he perhaps could have gotten some other sub-contractor to do the work, and he made up his mind that he was not going to give Mr. Rushlight the contract because at this time Mr. Rushlight was of the opinion that the award should be an award of \$300,000.00 for the sub-contract. Just how much discussion between the parties took place as to an offer and an acceptance is not a matter of so much concern, but the Court has no hesitancy in finding that Mr. Anderson knew upon his return here that Mr. Rushlight was going to expect a sub-contract providing for \$300,000.00, and by that time he felt that such a sum was out of proportion to the service that he would have to render, and out of proportion to what he could get another competent sub-contractor to perform the work, and an adjustment of that difference led to the visit to Mr. Anderson's home with Mr. Hall, and while the matter of bonding was one that was discussed, it was incidental. The matter of adjusting the price to be paid for this sub-contract was the primary and major matter. Mr. Hall was naturally called in as he was the man who was closely associated with Mr. Anderson for at least a week or more when they were securing the award from the government of the principal contract, and as a result of that conference there [658] was written into this letter that bears date April the 3rd the sum of \$293,000.00, which was \$7,000.00

(Testimony of Willard A. Rushlight.)

less than Mr. Rushlight insisted he was entitled to under the previous oral agreement, and \$7,000.00 more than Mr. Anderson was willing to pay, knowing that he could get some one else that would assume the responsibility for \$286,000.00. The only difficulty that the Court has had in arriving at that conclusion—and there has been some difficulty, is that this same letter that Mr. Rushlight presented and in which he wrote in these figures of \$293,000.00 and in which he changed the date from April the 3rd to May the 6th or May the 8th, he also wrote on there “revised”. That lends considerable support to the contention of the defendant that it was intended by the parties that that should include a revision that was already in progress and was known to all of them.

However, negating that to a degree that I feel justifies and warrants me in finding that the word “revision” was revision from the controverted sum of three hundred thousand dollars and two hundred and eighty-six thousand dollars, rather than a revision on the new and increased cost to the government of this construction, in accordance with the modified program, and I find that, because it is just a few days following that letter of May the 6th or 8th—

Mr. Peterson: May 9th, that offer.

The Court (Continuing): —May the 9th, that Mr. Rushlight writes to Mr. Anderson concerning this modification and he says:

(Testimony of Willard A. Rushlight.)

“You have verbally instructed us to proceed with the ordering of the material for the power plant [659] as revised. We would appreciate a change order from you covering the additional costs of this work.”

Now I am unable to see how Mr. Anderson could have read that language without being fully advised then that there was no meeting of the minds on May the 9th, concerning this changed work. Irrespective of what he might have thought, this indicates very clearly here, about—less than two weeks after the letter of May the 9th, that the sub-contractor expects by reason of the added burden, and it is admitted that he had an added burden ranging from seven to ten thousand dollars in this alteration to be recognized in it, and the next day he receives a reply directing him to proceed with the necessary change in the mechanical installations involved by the change in the government's plans and specifications. “as may be affected by your sub-contract. In accordance with our previous understanding you are to furnish a breakdown statement showing the different items on the plumbing, steam, heat and hot air installation. Will you please forward them?” To me this indicates clearly that the defendant Anderson had full knowledge of the fact that there was an added obligation growing out of the sub-contract. If there was doubt, certainly we come to the letter of May

26th, four days later, and there is an express condition written into that letter saying:

“Change order covering revisions in power plant as per our proposal dated April 30, 1941, \$12,118.00.”

This letter, apparently we have no further response to it, but by that time it was evident that the plaintiff was proceeding on the theory doing the work greatly [660] increased his own burden; that he was to have an increased amount of this sub-contract, and if not, earlier, I think I could safely find from the date of the execution of the agreement to perform the sub-contract for \$293,000.00, which was the outgrowth of a difference that had arisen between the time that the bid was submitted and May the 9th when this sub-contract agreement was presented, feeling began to arise between these parties and it grew and was tremendously accelerated and accentuated within less than a month after they had gone to work, and those differences became in a large measure the basis of the charges and countercharges that make up the numerous additional items, most of which—I dare say all of which would have been adjusted in some manner. I do not think that the plaintiff Rushlight made any unusual effort to save costs and charges to the defendant Anderson from that time on, and I do not think—in fact, the evidence establishes the fact that the defendant Anderson made no effort to protect the interests of the plain-

tiff in his sub-contract as between him and the government.

Both parties doubtless have suffered a loss by reason of the ill will that came along with the beginning of these transactions in the various items, but for the reasons that I have indicated here—there may be numerous others,—I feel that the plaintiff has sustained the burden of proof upon this major item in controversy here, and is entitled to a recovery thereon as well as the other items enumerated earlier in the consideration of this case, and the defendant is entitled to the credits that I have already indicated. [661]

Now you will have to prepare Findings along this line and I understand there is no disagreement between the parties concerning the date when interest would begin to run. There is only the other question, the second cause of action having been disposed of. That is the item of \$6,000.00, as to whether it is intended to be included in whatever the recovery was here, and interest run upon that from that date or as to whether it is to await the final settlement with the government on the whole contract.

Mr. Peterson: Our position on that is, Your Honor, that \$6,000.00 should be retained unless we may be able to get a decision out of Washington very shortly, on that, but the other—

Mr. Lycette: That is their money that is being held up, not our money that is being held up, and the \$6,000.00 is liquidated damages held against Anderson, not against Rushlight, and consequently

that is to hold up his money. There is no reason he should hold up our money.

The Court: No, if that is the basis—if there was any contention that was never gone into here that Rushlight had to perform within a given time.

Mr. Lycette: If there was any contention that was a charge against us—you make no contention that the six thousand dollars was charged against us. You said that on the first day of the trial.

Mr. Peterson: Our position is that—on that, that our sub-contract provides that we are not obligated to pay you until we get settlement with the government.

Mr. Lycette: I do not think we have to wait an unreasonable time, which has now been two or three years, [662] just because he has some—he has, I think, I showed up to forty-five different items on his appeal, and one of the items is the delay. I don't think we should be required legally or equitably to wait until he finishes out— [663]

The Court: Now this matter has been continued for the purpose of hearing some further testimony on the part of some witness who has—or some person who has submitted an affidavit as to facts which to the Court, appeared to be in such direct and sharp conflict with the testimony that was offered heretofore, that it gave evidence of some one not stating the truth on facts that they ought to know what they are, and for that reason I have, and largely for that reason, re-opened the case, and I assume this affidavit is offered on behalf of the plaintiff—or the defendant.

Mr. Peterson: On behalf of the defendant, Your Honor.

There are two or three affidavits, I think, possibly.

Your Honor, the question arose at the last hearing thereon—really two points—one is with reference to the execution of the—that instrument on May 9, 1941—that is, as to when it was completed—when the words were written in. The dispute arose as to whether or not it was written in at the Anderson house or whether that figure was completed before. That is one of the items that is set forth in the Philp affidavit. Another main branch of it is as to the question of the acquaintance. Mr. Rushlight testified point blank, I think on seven or eight different occasions in the record that he had never met Mr. Anderson before. I understood those two general questions would be opened for the Court.

The Court: Why, I will be glad to hear you [667] on both of them, and then the third one of course, primarily the testimony of Mr. Philp.

Mr. Peterson: Mr. Rushlight, would you take the stand, Mr. Rushlight?

WILLARD A. RUSHLIGHT,

produced as a witness on behalf of the Defendants, after being first duly sworn was examined and testified as follows:

Direct Examination

Mr. Lycette: Are we going to go back over the individual's testimony or take new testimony?

The Court: I do not know.

Mr. Peterson: It will be just on those subjects, the question of the acquaintanceship and possibly on that contract.

The Court: Yes, I will permit interrogation upon that.

By Mr. Peterson:

Q. Mr. Rushlight, referring to your testimony at the trial here, before, I asked you—I will just read it back a little bit so you can get the idea:

“How many trips did you make to Fort Lewis prior to May 9th, on this contract?”

You answered “Oh, I haven't any idea, Mr. Peterson”.

“Q. You made several trips out there, didn't you?”

“A. Prior to May 9th?”

“Q. Yes.”

“A. I know I made a lot of trips, but I couldn't say [668] what times prior to May 9th.”

“Q. Mr. Anderson did not ask you to make any bid did he, on this job?”

“A. On this job?”

(Testimony of Willard A. Rushlight.)

“Q. Yes. Who initiated the bidding here to Mr. Anderson?”

“A. I don’t quite get your point.”

“Q. Did he call on you for bids or did you volunteer the work in the first place?”

“A. Are you talking about the original bid before he received the job?”

“Yes.”

Now then,—“Well, I was introduced to Mr. Anderson by a representative of the Surety Company who asked me to give him a proposal on this job.” What was the name of that representative of the surety company?

A. Mr. Philp.

Q. Clyde Philp? A. Uh-huh.

Q. And what was the date of that?

A. Oh, I don’t recall the exact date now.

Q. With reference to April the 8th when your bid was submitted, when Anderson’s original bid was submitted to Fort Lewis and the day of the bid opening at Fort Lewis?

A. I don’t know the exact date that I met Mr. Anderson. It was sometime prior to the bidding.

Q. Was it on that date that Clyde Philp introduced you to Mr. Anderson?

A. I couldn’t say Mr. Peterson. It was prior to the bid opening of the main contract out at Fort Lewis. The exact date I couldn’t say at this time.

[669]

Q. All right. I asked you: “How long prior”—

(Testimony of Willard A. Rushlight.)

just a minute, strike that. "Who did?" I asked you the question.

"A. The representative of the surety company."

"And when was that?"

"A. Oh, that was prior to the opening of the bids, the exact time I don't know."

"Q. How long before the day of the opening of the bids was it?"—no, "How long prior was it? The day of the opening of the bids, wasn't it?"

"It could have been."

Did you answer that, "It could have been" the opening—

A. Yes, because I don't remember the exact date.

Q. Could it have been the day of the opening of the bids that Mr. Clyde Philp introduced you to Mr. Anderson?

A. I don't believe so, as to the best of my recollection. I believe it was one or two days prior to that. It might be. I can't remember those exact dates at that time, Mr. Peterson, unless we have something to refresh our memory. If we have a written document—

Q. Now then, Mr. Rushlight, you recall seven or eight different times during the trial that you were asked—I think by your counsel, as to whether you knew Mr. Anderson or had met him prior to this bid and you were asked at one time by the Court, and I think you answered every time in the negative, that this was the first time you met Mr. Anderson was in connection with this bid, is that so?

(Testimony of Willard A. Rushlight.)

A. That is right, but——

Q. Just a minute, now. The Court asked you “Well you knew each other before then?” [670]

“A. I never met Mr. Anderson prior to the time of this job.”

You made that statement, didn't you, and you repeated that answer six or seven times during the trial, did you not?

Mr. Lycette: I don't think he did.

A. I don't know. I testified to the fact that I had——

Q. Didn't you testify that in response to the Court's question “Well, you knew each other?” I will read right back. You will find out.

“The Court: Did you participate in any way in figuring the original bid Mr. Anderson made to the government?” says the Court. Didn't you answer “No, I did not, Your Honor?”

A. What bid are you talking about, on the Fort Lewis job?

Q. Yes, on the original bid. The Court asked you “Did you participate in any way in figuring the original bid Mr. Anderson made to the government?” Now you know what that means. You knew what the original bid that Mr. Anderson made to the government on April 8th—that is what we were talking about. A. That is right.

Q. And didn't you answer to the Court——

A. I am trying to get clear if you have reference to the main contract or to the plumbing and heating——

(Testimony of Willard A. Rushlight.)

Q. No, I am talking about the main. Did you—the Court asked you “Did you participate in any way in figuring the original bid Mr. Anderson made to the government,” and didn’t you say “No, I did not, Your Honor?”

A. Well, my interpretation of the Court’s question there, in preparing the original bid of Mr. Anderson, I never testi- [671] fied that I did, but I did testify that I did meet Mr. Anderson prior to his submission of the heating bid that he gave to the government. That is two different things, we don’t want to confuse.

Q. Didn’t the Court say “Well, you knew each other before then,” and you testified “I never met Mr. Anderson prior to the time of this job.” Isn’t that what you testified to? A. Yes, I did.

Q. Now then, Mr. Rushlight, I will ask you, you remember the Salem job, the building of the Capitol, and bidding on the Capitol at Salem, Oregon?

A. Yes.

Mr. Peterson: If Your Honor please, attached to the affidavit of Mr. Anderson in this case were two letters, one a proposal from Mr. Rushlight and another a copy of the bid of May 9th. I wonder if they might be detached from this affidavit and copies filed and they be introduced as exhibits in this case? I can substitute copies for them, attached to my affidavit and have them introduced in evidence in this case, if that could be done.

The Court: That could be done but it is just a

(Testimony of Willard A. Rushlight.)

question whether that is a matter that we want to re-open the case on, Mr. Peterson.

Mr. Lycette: Your Honor recall that Mr. Anderson never testified on that subject at all, here. It tends to—Urban here, I presume he sat here all the time during the entire trial of this case. Mr. Anderson never testified upon the subject at all. [672]

The Court: Upon the subject of acquaintanceship?

Mr. Lycette: No. After sitting here all the time through eight or nine days he did not mention it, nor did Mr. Urban. You recall they called Mr. Anderson for that sole purpose.

Mr. Peterson: You cross-examined him on the subject of his acquaintanceship and you asked him if he did not testify to the fact that he had never met Mr. Rushlight before and Mr. Anderson answered you "that was Mr. Rushlight's testimony, not mine."

Mr. Lycette: And we never touched the subject again during the whole time we were here in court.

Mr. Peterson: This is one of the bids that Mr. Rushlight made to Mr. Anderson in 1936, and we can show, Your Honor please, the conversations that he had with Mr. Anderson at that time, the subsequent meeting at the bidding, the meeting—subsequent meetings at the Multnomah Hotel and on five or six prior occasions.

The Court: You may proceed and interrogate him along that line.

(Testimony of Willard A. Rushlight.)

I might state to the parties what the Court is interested in, in this particular phase of this case, is to ascertain if someone is deliberately falsifying here. While the matter may not be directly material to the issues involved, nevertheless it bears a relationship sufficiently close that it would cause the Court to give serious consideration to the weight and credibility to be given to the testimony of a witness, as well as other means of protecting it for ascertaining the truth. [673]

Q. Mr. Rushlight, showing you Defendants' Identification A-33, is that written on your stationery? A. Yes, sir.

Q. And is that your signature? A. Yes.

Q. And that was addressed—that is a bid addressed to Eivind Anderson at the Heathman Hotel in Portland? A. That is right.

Q. And how did you know that Mr. Anderson was at the Heathman Hotel in Portland?

A. I couldn't say at this date. This is way back in 1936.

Q. That is the time you recall the bidding—that was the time the bidding was for the Oregon State Capitol, was it not?

A. I believe so. It must have been, because this bid is for that purpose.

Q. Did you know that Mr. Anderson had his estimators and his staff in various rooms at the Heathman Hotel in Portland at that time this letter was written, or this bid was made?

A. No, I can't say that I did at this time.

(Testimony of Willard A. Rushlight.)

Q. Didn't you, Mr. Rushlight, personally call on Mr. Anderson at the Heathman Hotel in connection with that bid—with this bid?

A. Not that I recollect.

Q. Not that you recollect?

A. No, but to cut this thing short, Mr. Peterson—

Q. You don't have to cut it short.

The Court: I want him to go ahead and state, if he has any explanation to make. [674]

A. Well, Your Honor, I would like to explain this situation. I tried to—I think in the last trial, that in our operations we meet lots of contractors—meet hundreds of them. We put out lots of bids, some by mail, some are delivered by me, and some delivered by the men in our organization. I testified here previously that I never met Mr. Anderson. While I was talking to Mr. Philp during the trial last time, he reminded me of Mr. Anderson having been in Portland in the Multnomah Hotel in connection with—I don't remember what job it was, now, and refreshed my memory. Working back to the name of that job I did recall then that I had met Mr. Anderson. At that time I was—I thought that particular period had come after this Fort Lewis job, in my own mind, but in talking to Mr. Philp and checking back on the dates, why, I was in error in my testimony. I did meet him, but only casually, in the Multnomah Hotel, and I might have met him or talked to him in connection

(Testimony of Willard A. Rushlight.)

with this job that Mr. Peterson is talking about, but I don't recollect it because that was way back in '36. I do know when this particular Fort Lewis job came up and I had this deal with Mr. Anderson, that I particularly asked Mr. Philp at that time, because we had this verbal agreement, if Mr. Anderson could be depended upon to keep this verbal agreement, because I did not know him, but I have met him prior to this date. In that respect my testimony was in error during the trial, but it was an honest error because I had forgotten the chronological dates, and I had also forgotten—

The Court: When did you discover that, during [675] the last trial?

A. Well after the case was closed and talking to Mr. Philp, we were discussing this matter and he brought up the time that Mr. Anderson was in Portland. Well he says, "I think you did meet him at the particular time" and I recall having met him in the Multnomah Hotel. I don't remember now which job it was,—it was the Pendleton Airport job, and he was bidding on some other contract, and it is rather hard for me—a large number of projects. We figure to keep all these dates and the chronology of these periods in mind, but I didn't know Mr. Anderson well, but I did meet him in connection with the bid of the Pendleton deal, in connection with this matter Mr. Peterson is talking about in 1936, it is possible I might have met Mr. Anderson. I couldn't testify that I did or did not.

(Testimony of Willard A. Rushlight.)

I might have, because it has been so many years ago. In meeting so many contractors it is possible I might have and I didn't recollect it at the time of my testimony in the last case, but I do recall having put the thing together and discussing the matter with Mr. Philp, that I did meet Mr. Anderson casually at the Multnomah Hotel, in connection with this Pendleton Airport case. In that particular my testimony was in error.

Q. Was that the only time you met him in 1940 at the Multnomah Hotel, in connection with the Pendleton Air Base job?

A. I might have met him some other times. If you could give me something to tie it to—

Q. Well, get back to the Capitol, didn't you attend the [676] opening of the bids? Mr. Anderson made a general bid on that capitol, did he not, for the Salem Capitol, in 1936?

A. Well, I believe he did.

Q. And didn't you—were you present in the bid opening in Portland at the Library Building, that is where the bids were opened?

A. I don't remember about that.

Q. Do you know Dewey Martin of Olympia?

A. Yes, I do.

Q. Do you know Mr. Montgomery, Mr. Anderson's estimator?

A. Yes, I know Mr. Dewey.

Q. Wasn't Montgomery, Mr. Anderson and Dewey Martin, and Joe Russell—were you not pres-

(Testimony of Willard A. Rushlight.)

ent with them at the opening of the bids in the Library Building in Portland on that?

A. Well, I might have been, Mr. Peterson, but I don't remember whether I was or not. For me to sit here, away back in 1936 to say I was there or wasn't, I couldn't.

Q. Don't you recall that at that bid opening Mr. Anderson, instead of furnishing a bid bond, presented a certified check for \$50,000.00, and that was held up by the man as a rather peculiar incident, that the man would support the original bid with a certified check rather than with a bond? You remember that incident?

A. No, I don't remember that.

Q. Didn't you walk with Mr. Anderson, Dewey Martin and Montgomery from that place, the Library Building, to the Multnomah Hotel, to where you folks were engaged in a party for several hours, you and Mr. Anderson and Roy Montgomery and Dewey Martin? [677]

A. No. It might be possible I don't recollect it.

Q. The next year, or 1937, didn't you bid with Mr. Anderson on the Yakima Postoffice job, on the Wenatchee Postoffice job?

A. Yes, that is right, we did give Mr. Anderson a bid on the Postoffice job at Wenatchee.

Q. And you were the low bidder?

A. I don't know about that.

Q. And didn't Mr. Anderson at that time come to your place in Portland and you stated to Mr. Anderson that you were not able to do the job

(Testimony of Willard A. Rushlight.)

right at that time because of other work, but that you would take him to Mr. Urben, another plumber in Portland, and didn't you take Mr. Anderson over to Mr. Urben's office in Portland and introduce him to Mr. Urben in 1937 on that Wenatchee Postoffice job?

A. I remember the incident, not the date, but that is true.

Q. You met Mr. Anderson on that date, didn't you?

A. Yes, sir, he came in the office and I took him over and introduced him to Mr. Urben, and Mr. Urben continued about his business.

Q. In 1940 I believe you remember of having a meeting, when Mr. Anderson along with Mr. Mullen and Mackery, they had joined together on a general bid for that airplane unit at Pendleton?

A. Yes, I remember.

Q. And didn't you make a sub-bid for the plumbing to Mr. Mackery and Mullen and Eivind Anderson in connection with that?

A. I made a sub-bid on the plumbing to that firm, yes, on the [678] plumbing.

Q. And then you met him later in the Multnomah Hotel and that is the item now you say, that Clyde Philp refreshed your recollection on?

A. Yes, that is right and I did meet Anderson there casually. However, I was not well acquainted with Mr. Anderson.

Q. Well, that party there went on for several hours at the Multnomah Hotel, did it not?

(Testimony of Willard A. Rushlight.)

A. I couldn't say. When a group of contractors get together they come and go.

Q. But you say you did not know Mr. Anderson?

A. It was my testimony in the last case, at the time of this job, and I am stating here for the benefit of the Court I was in error on these particulars. I had met Mr. Anderson only casually. I have met him in these various instances and it had slipped my mind, but the chronology of events had become confused, even after I was reminded of the fact he had been in these particular places.

Q. All right, now in 1940, I will ask you, Mr.—in the fall of 1940, whether you did not go to the Winthrop Hotel with a Mr. Pugh of the Fuller Construction Company in the east, and didn't you call Mr. Anderson at his home and ask him to come to the Winthrop Hotel to confer with you and Mr. Pugh with reference to a certain bid at Fort Lewis?

A. I don't remember that, Mr. Peterson.

Q. Do you know Mr. Pugh?

A. Yes, I know Mr. Pugh of the Fuller Company.

Q. Didn't you call Eivind Anderson down to the Winthrop Hotel and he and his son Tom came down there and you [679] discussed the matter with Mr. Pugh, and you served him some drinks, and then after you visited for quite a while—

A. I don't remember that. What job was that in connection with?

Q. Fort Lewis, the job at Fort Lewis.

(Testimony of Willard A. Rushlight.)

A. I don't recall any job at—what year was that in?

Q. 1940, in the fall of 1940, from the Winthrop Hotel.

A. I don't recollect it, Mr. Peterson.

Q. Now then, Mr. Rushlight, you testified at the trial, I believe, that it was the custom of your firm—or just a minute. You testified to the making of this bid of May 9th, 1941, that it was put on a form of bid that you dated April 3, 1941. That is so, wasn't it?

A. I don't quite get your question there. I don't believe I testified to that, Mr. Peterson.

Q. All right, showing you A-34, Defendants' A-34, Mr. Rushlight, what is that?

A. Well, that is a copy of a bid to Mr. Anderson on this Fort Lewis job in question here.

Q. All right. Now that was—that is an original letter, written April 3, 1941?

A. That is right.

Q. That is in your handwriting, is it?

A. No, it is not. That is in typewriting, Mr. Peterson, April 3, 1941.

Q. I understand, but to conform to the original which is on file in here, you wrote in the date on it, May 9, 1941?

A. Yes, I changed the date on it.

Q. That is changed in your handwriting?

A. Yes, I changed the date on this proposal at Mr. Anderson's [680] request to May the 9, 1941, at that meeting.

(Testimony of Willard A. Rushlight.)

Q. And you wrote in the word "Revised"?

A. That is right.

Q. And you wrote in the words \$393,000.00?

A. \$293,000.00.

Q. Two hundred and ninety-three thousand?

A. Yes, I did. I wrote in the amount there.

Q. Now this is a direct copy, is it not, of Plaintiff's Exhibit 8?

A. Yes, there was two copies in the court room the last time we were here. One is a duplicate of the other. In other words, they were both made at the time, because I tried to get Mr. Anderson to give him an acceptance on one of them.

Q. When did you write in "Rushlight"—when did you type in the name of Eivind Anderson, Tacoma, Washington. "Dear Mr. Anderson", that is in typewriting. When did you type that in?

A. Well these forms were all made up, Mr. Peterson, at the time the original job was bid, and we usually make them up in several copies.

Q. But Mr. Anderson's name wouldn't be on the original, on the blank form that you made out, would it?

A. Well, you must understand in making these up we make them all on our letterhead. Because of the copy, on the letterhead we don't use a tissue paper.

Q. You wouldn't be writing Mr. Eivind Anderson on the copy—turn to the one you submitted to the Heathman Hotel, just underneath that. Now isn't that typical of your—now that was the one

(Testimony of Willard A. Rushlight.)

that went to all the firms and all the bidders, [681] and you typed in his name there, didn't you?

A. Yes, that is right.

Q. Well, did you type his name in the one of May 9th? A. Yes.

Q. When did you type it in, when the original bid was made up or later?

A. I believe it was typed in when the original bids were made up. In other words, these were copies of the form that was made up at the time Mr. Anderson was given the original bid of \$300,000.00.

Q. How many copies of that letter did you make to Eivind Anderson?

A. I couldn't say. This is a copy of the original proposal.

Q. Those copies made with Mr. Anderson's name on, would not be applying to any other contractors, would it? A. That is right.

Q. Then how many copies did you make of Mr. Anderson's bid?

A. Well, that I couldn't say.

Q. And you kept the original yourself, didn't you?

A. Now you are talking about the original, Mr. Peterson? I am trying to explain to you when the girl is getting out these bids in our office, this paper as you notice, is a heavy letter typed paper, received this printed, and they can only make not over four copies and get them legible in the typewriter. On one job we may have several so-called

(Testimony of Willard A. Rushlight.)

original copies. None of them are originals because they are all duplicates of the same thing, but as far as being the top sheet going through the typewriter is concerned, it is an original because we can only get so many copies in the typewriter. [682]

Q. It is the original so far as Mr. Anderson was concerned. When you made that bid you typed in Mr. Anderson's name right at the time; that was the original as far as Mr. Anderson was concerned, and those particular ones would only apply to Mr. Anderson. Why did you make only three or four copies to Mr. Anderson?

Mr. Lycette: Your Honor, we went over exactly the same thing at the time of the trial.

Mr. Peterson: It is not.

Mr. Lycette: Exactly the same thing at the trial.

The Court: Objection will be overruled.

Q. Mr. Rushlight, why would you make three or four copies of the bid to Mr. Anderson and then retain the original?

The Court: That is argumentative.

A. I don't know how to answer that, Your Honor, because—

The Court: Well, the fact, in connection with these items, I don't know why this other was not produced when we originally had the trial—some indication these affidavits—

Mr. Peterson: It went into the surety company file.

(Testimony of Willard A. Rushlight.)

The Court: But the fact is that this contract was not—or bid, was not submitted, the major contract, until the 8th of April—isn't that the date, or 9th of April?

Mr. Peterson: 8th of April. That is, the main bid.

A. I don't know. [683]

The Court: My notes indicate that was the testimony, it was about the 8th of April. Your testimony was that you met Mr. Anderson on the morning that you went out there to that—he went out to submit his bid.

A. I testified, Your Honor, I believe, that I met him prior to the date of this—of the time he put in his main bid to the government.

The Court: Well, the document that you are being interrogated on now bears date of April 3rd.

A. That is true.

The Court: That is five days before he had submitted his bid.

A. Well, that may be, Your Honor. There may have been a postponement by addenda on this job. I don't know, but we prepare our bids ahead of time to get them to the general contractors. Ordinarily we don't get our bid prepared that much ahead of time. There must have been some reason for that many days elapsing between our proposal and the date of the government bid, because usually we are just a day or two ahead of time.

The Court: What counsel is asking indirectly, and the Court is asking directly, you did not, ac-

(Testimony of Willard A. Rushlight.)

According to your own testimony, on the 3rd day of April, you had no knowledge at all that Anderson was going to be the successful bidder.

A. That is right.

The Court: Yet now these documents, duplicate originals, indicate that you had prepared a sub-contract bid on that date, leaving the amount of it blank.

A. Yes. I thought I had testified, Your Honor, [684] in connection with that in the last trial. We quite often do that. Any sub-contractor will tell you the same thing, that you change your figures. In other words, we are in competition,—you see what I mean? And we get figures at the last minute from the material houses. Prices change and we don't type the exact figures in for that reason also, you see, and we make extra copies in case we get a revised price that clearly affects our bid, why we can have an extra copy to shoot out and revise the price to our contractors, because otherwise, you get out of town on these bid openings and you don't have stenographers with you, and typewriters, and all that equipment, and it makes it very inconvenient unless you have these extra copies made up to change your bid suddenly, you see, upon a change on this information you receive or a change in the price on certain materials, or——

The Court: Well the Court made a finding there was an oral understanding between you people that you were to have \$300,000.00, if by your joint efforts

(Testimony of Willard A. Rushlight.)

you were successful in getting this contract for Anderson, and I am still of the same opinion in reference to your joint efforts, but I am somewhat in doubt now as to these figures, because your testimony was not frank and full with the Court in the matter that now becomes somewhat material on this past acquaintanceship, and I was prompted only to ask you such a question because it seemed rather unusual in the course of human conduct, two men, involving substantial money, of a sum of this kind, would meet for the first time through an intermediary and then engage in an oral agreement by using—let us, for the purpose [685] of argument say legitimate pressure upon those who had the power of granting the contract, such arguments as would ultimately result in securing the contract. That just does not seem natural or reasonable, that men who were total strangers would engage in that and then we come to the question as to how this word “revision” gets on these, and your explanation was one that I had in doubt to a degree, but I felt that the defendant was even more to blame, a business man with wide experience and accepting a matter of such vital importance by merely having you write the word “revision” upon it.

Now if the Court can not depend upon your veracity, why of course it is going to change the situation, and this is the reason I have required this further hearing, because someone, whether intentionally or otherwise, has testified to facts that are

(Testimony of Willard A. Rushlight.)

not the truth, and of course you admit now on the matter of acquaintanceship——

The Witness: Your Honor, I have tried to tell you the truth in this case as I knew it at the time, and as I explained to you, these things happen over a period of years. I never *new* Mr. Anderson well—had any business dealing with him or any social contacts. He may have been present at the group of contractors' meeting, and like they do, have a drink or two in a hotel room. That may be true, but that——

The Court: Because you have just admitted here in the record you took him down some years before and introduced him to somebody else——

A. Yes, but, Your Honor, Mr. Anderson came to see us in connection with this postoffice job——

[686]

The Court: I do not care for the circumstances surrounding——

A. I was going to explain to Your Honor, if you will permit, that does not necessarily mean I am well acquainted with the man. A stranger may come in——

The Court: You did not understand. The Court is asking you whether you were well acquainted, but before, didn't you understand very distinctly whether you had ever known this man before?

A. Yes, sir. I was in error, and the only thing I could do, since my memory is refreshed by these specific cases, is to say to you I was in error——

(Testimony of Willard A. Rushlight.)

my testimony was wrong, to be honest and proper with this Court. If I have made a mis-statement and afterwards find I made a mis-statement, I come in and tell the Court honestly I have made a mistake, due to my failure to recollect these bids, and that is what I am doing today.

The Court: Proceed if you have anything further.

Q. Mr. Rushlight, you and Mr. Hall came to Tacoma on May 9th, to Mr. Anderson's house?

A. Yes, sir, I believe that was the date, Mr. Peterson.

Q. And where did you come from?

A. Well——

Q. To Tacoma.

A. I don't recall where we came from now, Mr. Peterson.

Q. I will ask you whether or not you lived at Portland? A. Yes, sir.

Q. And Mr. Hall lived at Portland?

A. Yes, sir.

Q. And you came up to Seattle on the train, did you? [687]

A. I don't recall how we got up there.

Q. Well, do you recall whether you contacted Clyde Philp on May the 9th at Seattle, and asked him to haul you to Tacoma?

A. No, I don't remember that.

Q. Huh?

A. I don't believe that is so, not to the best of my recollection.

(Testimony of Willard A. Rushlight.)

Q. You say you don't believe that is so?

A. That is right.

Q. How did you get to Tacoma on May the 9th?

A. I can't tell you truthfully how Mr. Hall and I came up to Tacoma, whether we drove up or whether we came up on the train.

Q. How did you come to Mr. Anderson's house on May the 9th?

A. Well, I don't recall. I suppose we drove over, Mr. Peterson.

Q. Drove over from where?

A. For me to make a definite statement, these dates were back so—

Q. No, at the time of this contract.

A. Well, that is considerable time ago. I can't remember just how I got there.

Q. Who was present at the Anderson house that night?

A. Well to the best of my recollection there was Mr. Anderson's son who testified in this case, Mr. Anderson and his wife and daughter, and Mr. Hall.

Q. Was Mr. Clyde Philp there?

A. I don't recollect—I don't believe Mr. Philp was there. I don't recollect Mr. Philp being there.

[688]

Q. Isn't it a fact, Mr. Rushlight, that Clyde Philp drove you from Seattle to Tacoma on May the 9th?

A. I don't believe it is a fact, because if he had he probably would have been there.

(Testimony of Willard A. Rushlight.)

Q. I will ask you whether or not at the home of Mr. Anderson that night, if you recall Mr. Clyde Philp sitting in a chair—in a Morris chair I think, half asleep when the negotiations were going on, and Mr. Anderson went over to him and pulled off his shoe? A. No, I don't remember that.

Q. Huh?

A. I don't remember that, either.

Q. Mr. Philp wrote your bond in this case, did he not? A. Yes, sir.

Q. And I will ask you whether or not, Mr. Rushlight, if it is not a fact that on May the 9th, 1941, that Mr. Philp drove you and Mr. Hall from Seattle to Tacoma, and that you told Mr. Philp that you were going over to Mr. Anderson to submit a bid to him for \$293,000.00?

A. I certainly don't remember any such incident, Mr. Peterson.

Q. And is it not a fact—

A. I don't believe that it happened.

Q. And isn't it a fact that this agreement or this proposal of May 9th, 1941,—didn't you have the figures \$293,000.00 written in to both the original and the copy when you arrived at the Anderson house? A. No, sir, that is not a fact.

Q. And didn't you tell Mr. Philp at that time that you had put in the bid—that you were putting in a bid for [689] \$293,000.00?

A. No, sir, I know that was not a fact, because these figures were put in this bid at Mr. Anderson's house, and in his little office just where you

(Testimony of Willard A. Rushlight.)

go into his front room. This whole thing was written with the same pen and at the same time, the price and the date and the word "revised".

Q. They may have been written at the same time but weren't they both written before you got to the Anderson home?

A. No, they were written in his home.

Q. Well, where did you stay on the night of May 9th? Did you stay in Tacoma or did you return somewhere?

A. I don't remember. I might check the hotel record if it is of any moment and find out, but I don't recall where we stayed that particular night.

Q. Your counsel had showed you the affidavit of Clyde Philp, where he stated, didn't he, that he was the one that transported you and Mr. Hall to Tacoma?

Mr. Lycette: I object to that as immaterial.

Q. Didn't you have an opportunity to check up on the truthfulness of his affidavit?

Mr. Lycette: I object to that. That is not proper cross examination. You ask him to pass upon—

The Court: Objection will be overruled. The Court wants to get at what the facts are, and if there are lapses of memory and so on.

Q. Counsel called your attention to Mr. Clyde Philp's affidavit. Have you read that?

A. Yes, sir, I have.

Q. Well he stated in that affidavit he transported you and Mr. Hall from Seattle to Tacoma on May 9th? [690]

(Testimony of Willard A. Rushlight.)

A. Yes, sir, but evidently Mr. Philp is in error.

Q. Didn't you have occasion to check up on how you came to Tacoma and where you stayed, or how you got there?

A. No, I did not.

Q. You haven't taken any means to check that up?

A. No, sir. Mr. Philp was with me on a later occasion and he may be confused in that respect.

Q. Well, we are talking about this occasion, May 9th.

A. To pin us right down to a date, I think certainly one or the other of us is confused.

Q. You don't know how you got to Tacoma that night or how you got away from Tacoma?

A. We drove, I know that, but where we drove from or how we met, whether we both had our cars and met in Tacoma, or not I don't remember, and I am not going to make a statement unless I am definitely clear in my mind.

The Court: I did understand you to state that at this conference where you finally negotiated this sub-contract there were present only you, Mr. Hall, Mr. Eivind Anderson and his son.

A. Yes, Your Honor, and I discussed that matter further with Mr. Hall last night, thinking I might be in error due to Mr. Philp's affidavit, and he stated that he did not remember in checking the testimony why both Mr. Anderson and his son both testified that Mr. Philp's wasn't there, so we

(Testimony of Willard A. Rushlight.)
all agreed he was not there, so I figured my memory must be correct on that point. Now if I am in error, sitting before this Court, I would readily admit it because I don't claim to have an infallible memory. I can't remember all these things accurately, but I am [691] trying to give the Court an honest recollection of these matters and if I remembered that I certainly would tell this Court, because I see no reason why I shouldn't give the Court all the facts in my mind.

Mr. Peterson: That is all. Just a moment. I think that is all.

Your Honor, I offer in evidence, if Your Honor please, the Defendants' A-33 and Defendants' A-34.

Mr. Lycette: I have no objection.

The Court: It will be admitted in evidence. One is just a duplicate of one that has previously been admitted in evidence?

Mr. Peterson: That is right.

(Whereupon documents referred to were received in evidence and marked Defendants' Exhibits A-33 and A-34, respectively.)

(Testimony of Willard A. Rushlight.)

DEFENDANTS' EXHIBIT A-33

[Letterhead]

A. G. Rushlight & Co.
407 S. E. Morrison St.,
Portland, Oregon

November 19, 1936

Ivan Anderson
Heathman Hotel
Portland, Oregon

Subject: Proposal for the Plumbing,
Heating, Ventilating, and Automatic
Sprinklers, Oregon State Capitol
Building

We hereby propose to furnish all labor and materials required for the installation of the plumbing, heating, ventilating, and automatic sprinklers for the Oregon State Capitol Building to be constructed in Salem, Oregon, in strict accordance with plans and specifications as prepared by Trowbridge and Livingston, Francis Keally, and Whitehouse and Church, Architects, specification section "1", pages 1 to 23, and section H. V., pages 1 to 28, and the applicable provision applying to the plumbing, heating, ventilating, and automatic sprinklers in addenda 1 to 5 inclusive, for the sum of \$178,868.00,

(Testimony of Willard A. Rushlight.)

(One hundred seventy-eight thousand, eight hundred sixty-eight dollars.)

Yours very truly,

A. G. RUSHLIGHT & CO.

By W. A. RUSHLIGHT

WAR:MP

[Endorsed]: Filed June 29, 1944.

DEFENDANTS' EXHIBIT A-34

[Letterhead]

A. G. Rushlight & Co.
407 S. E. Morrison St.,
Portland, Oregon

Revised*

April 3, 1944

May 9, 1941*

Mr. Eivind Anderson
517 N. Eye St.
Tacoma, Wn.

Dear Mr. Anderson:

We hereby propose to furnish the Plumbing, Steam Heating, and Hot Air Heating Systems, in strict accordance with Specification No. — Fort Lewis—32, and plans applying thereto, consisting of a 400 Bed Hospital Group and 36 Miscellaneous Buildings, for the sum of Two Hundred ninety-three Thousand 00/100 Dollars \$293,000.00.*

The above proposal includes all work covered

*[In longhand]

(Testimony of Willard A. Rushlight.)

under the Plumbing section of the specifications, Paragraphs P-1 to P-21 inclusive; all work under the Steam Heating part of the specification, mechanical equipment, boiler house and Steam Distribution, Paragraph ME 1 to ME 15 inclusive, Heating Steam Plant, H-1 to H-7a inclusive; Service Clubs and Dental Clinics, H-8 to H-17 inclusive; Theatres, TH-HV-1 to TH-HV-17 inclusive, and Hot Air Heating, Paragraphs HA-1 to HA-7 inclusive.

The following is our proposal for unit prices as called for in the Call for Bids.

Item No. 3

- A. Add the sum of \$2100.00
- B. Deduct the sum of \$1950.00
- C. Add the sum of \$253.00
- D. Deduct the sum of \$200.00
- E. Add the sum of \$750.00
- F. Deduct the sum of \$655.00
- G. Add the sum of \$1800.00
- H. Deduct the sum of \$1700.00
- I. Add the sum of \$1000.00
- J. Deduct the sum of \$850.00
- K. Add the sum of \$12,500.00
- L. Deduct the sum of \$10,500.00
- M. Add the sum of \$60.00
- N. Deduct the sum of \$55.00
- O. Add the sum of \$1000.00
- P. Deduct the sum of \$900.00
- Q. Add the sum of \$7800.00
- R. Add the sum of \$5000.00
- S. Add the sum of \$10,000.00

(Testimony of Willard A. Rushlight.)

Item No. 4, Unit Prices, Section B.

| | | | |
|-----|--------|---|------------------|
| 1. | 1 1/4" | Steel pipe, Std. installed..... | .75 pr. lin. ft. |
| 2. | 1 1/2" | " " " " | .86 |
| 3. | 2" | " " " " | 1.00 |
| 4. | 2 1/2" | " " " " | 1.27 |
| 5. | 3" | " " " " | 1.45 |
| 6. | 1 1/4" | Genuine Wrought Iron Pipe, installed | .83 |
| 7. | 1 1/2" | " " " " " " | .95 |
| 8. | 2" | " " " " " " | 1.13 |
| 9. | 2 1/2" | " " " " " " | 1.49 |
| 10. | 1 1/4" | Std. Rising Stem Gate Valves, installed | 8.70 ea. |
| 11. | 1 1/2" | " " " " " " | 9.40 |
| 12. | 2" | " " " " " " | 12.40 |
| 13. | 2 1/2" | " " " " " " | 15.00 |
| 14. | 1 1/2" | anchors, installed | 6.25 |
| 15. | 2" | " " " " | 7.50 |
| 16. | 2 1/2" | " " " " | 8.75 |
| 17. | 3" | " " " " | 10.00 |
| 18. | 1 1/2" | Expansion Joints, installed..... | 83.00 |
| 19. | 2" | " " " " | 88.00 |
| 20. | 2 1/2" | " " " " | 107.00 |
| 21. | 3" | " " " " | 132.00 |

Yours very truly,

A. G. RUSHLIGHT & CO.

By W. A. RUSHLIGHT, Pres.

WAR:FP

[Endorsed]: Filed Jun. 29, 1944.

Mr. Lycette: I have no questions.

The Court: That is all.

(Witness excused.)

Mr. Peterson: Mr. Philp, take the stand, please.

[692]

CLYDE ELMER PHILP

produced as a witness on behalf of the Defendants, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Mr. Philp, your full name?

A. Clyde Elmer Philp.

Q. Where do you reside, Mr. Philp?

A. Seattle, Washington.

Q. And you have been subpoenaed to testify here?

A. I was subpoenaed by Mr. Anderson, personally.

Q. Yes, and Mr. Philp, what has been—what was your business in 1941?

A. Surety bond salesman.

Q. And where was your office?

A. In the 1411 Fourth Avenue Building.

Q. Where?

A. In Seattle, Washington.

Q. In Seattle, Washington, and did you know Mr. A. G. Rushlight?

A. I was acquainted with Mr. Rushlight.

Q. How long have you known Mr. Rushlight?

A. For some period of time.

Q. And—well, would you say how many years?

A. Well, it would be three or four or five years, something in that period of time.

Q. Three, or four, or five years, and that is W. A.?

(Testimony of Clyde Elmer Philp.)

A. It is W. A. Rushlight.

Q. That is the gentleman that just testified here? [693]

A. Yes, sir.

Q. Now then, Mr. Philp, directing your attention—omit that. By the way, you wrote the bond for Mr. Anderson in this case?

A. Yes, sir, I did.

Q. And directing your attention, Mr. Philp, to the evening of May 9th, 1941, I will ask you if you met Mr. Rushlight on that date?

A. Yes, I met Mr. Rushlight on that date.

Q. And where? A. In Seattle.

Q. And how did you come to meet him?

A. To my remembrance, Mr. Rushlight called me and asked me to take he and Mr. Hall to Tacoma for a meeting with Mr. Anderson.

Q. And did he say for what purpose?

A. Well he had been negotiating with Mr. Anderson on this job, and they—Mr. Rushlight was trying to pin the price down on the job and he—this meeting was for that purpose.

Q. Did he say why he was going to Tacoma?

A. It was for the purpose of arranging with Mr. Anderson on the—on a price that he was going to do the plumbing and heating work on the hospital job.

Q. Uh-huh. All right, did you arrange to take him over?

A. I took him over in my car.

(Testimony of Clyde Elmer Philp.)

Q. What time did you leave Seattle?

A. At—Your Honor, if I may, I keep a diary,——

The Court: You may refer to it.

A. I don't want somebody to think I am a master [694] mind.

Mr. Peterson: If your diary will show what time you left, to refresh your recollection.

A. I don't have any time in the diary when I did leave. I merely have a statement in here in the evening I went with Rushlight and Hall to Tacoma and we stopped at a chicken dinner place named Leaks for dinner—the three of us, and then we proceeded from there on to Anderson's.

Q. Mr.—all right, and then after you left did you go to Mr. Anderson's house?

A. I went to Mr. Anderson's house.

Q. And what did you do there, if anything?

A. Well, it was a long evening, with Mr. Anderson and Mr. Rushlight negotiating between themselves on this contract.

Q. And——

The Court: Well what was their—the difference or bone of contention?

A. Well, Your Honor, I don't know if I should say this or not, but this contract that Mr. Rushlight was trying to secure from Mr. Anderson was for the plumbing and heating on this hospital job, and in this discussion here, they were talking about the original job as bid on the plans on April 8th,

(Testimony of Clyde Elmer Philp.)

and the figure as I understood that they were going to talk about was three hundred thousand dollars. In some way I have lost my remembrance, but it got down to two hundred and ninety-three, and I just don't remember how the difference was arrived at, or exactly when it was, but there was two ninety-three that was finally arranged at, at this meeting. [695]

The Court: What was said about the modified plan?

A. I don't know what they meant by modified. The differences that came up there, Mr. Anderson had a much lower bid that had been submitted to him by another heating contractor—Lord and McRae of Portland, and he was talking to Mr. Rushlight at great length. He had a low bid there; that he had been after the job. He felt that Mr. Rushlight should help him in his bid, and that is the only thing that I can see that Mr. Rushlight voluntarily reduced it from three hundred to two ninety-three.

The Court: Well the Court is not concerned with the reduction from three hundred to two ninety-three primarily, but I am concerned and the parties are all concerned with the modification of this original bid, and you sat right there in the room during all the conference.

A. I was in the room all the time, Your Honor.

The Court: And that was for several hours?

A. We must have been there for at least four hours, we were there.

(Testimony of Clyde Elmer Philp.)

The Court: Did either of the parties suggest to you before the principal trial here they might want to call you as a witness?

A. No, sir.

The Court: You were interested, of course, in being friendly with both of them?

A. Well, as far as my personal relationship with either of the witnesses now is immaterial to me.

The Court: You write bonds and get commissions and that is the way you make your living?

[696]

A. I don't write bonds any more, Your Honor. I am a contractor, myself.

The Court: At that time your interest primarily of course, was in carrying out your business operations and was pecuniary in its nature, and if you could write the bond for the principal contractor and the bond for the sub-contractor, that meant that much more business, and that much more commission.

A. The company of course pay commissions on various businesses.

The Court: Well the fact is that you wrote both bonds?

A. Both bonds.

The Court: For the principal and for the sub-contractor?

A. That is right, Your Honor.

The Court: And I assume from the testimony that has gone before, you were very active in seeing

(Testimony of Clyde Elmer Philp.)

that Rushlight got in on this transaction as a sub-contractor?

A. That is right, Your Honor. I felt—I felt that Mr. Rushlight—I knew had given a great deal of help in this matter, and I felt because of that that he had helped me in my commissions and he helped Mr. Anderson, he was entitled to a lot of consideration. Now I have here a very—I would say seven or eight meetings that I was with Mr. Anderson and Mr. Rushlight.

The Court: Between April the 8th and May 9th?

A. Between April 8th and May 9th—there was one that came in here on May 2nd, I noticed, that I was with Mr. Anderson and Mr. Rushlight in preparing a re- [697] vised—preparing figures. I typed them myself on Mr. Anderson's typewriter, a figure for some boiler installation out there. That was on May 2nd.

The Court: Well, that was for—that is what they have been designating as the revision of the contract that increased the government's costs for the construction.

A. Well, it is just one of the change orders.

The Court: I presume both parties will agree on May 2, these boilers, those came in connection with this revised contract?

Mr. Peterson. That is right.

The Witness: Your Honor, if I may say—

The Court: I want you to tell the facts and I am sure that the parties on both sides do.

A. There was no—

(Testimony of Clyde Elmer Philp.)

The Court: I think you were a very material witness and should have been called on the first trial.

A. There was no time on this May 8th meeting that additional price was brought up before the members of that meeting.

The Court: Well, but on May 2nd they were discussing it, you say?

A. That is right. They had given prices. Mr. Rushlight assisted Mr. Anderson in preparing prices to submit to Colonel Antonovich for the government to approve, and to my—to the best of my remembrance, those prices had not been approved on May 8th, and Mr. Rushlight I don't believe, I can not recall it, was able to sit down and give a firm price to the dollar on—I think [698] it was boilers, as I remember it.

The Court: Well, is there anything in those various meetings that you have kept a diary of that deals directly with this question as to what the sub-contract, based upon the original bid for the major contract, would be?

A. No, I made no such entry, no.

The Court: Well you wrote the bond and of course you were concerned in writing the bond as to what the amount of the sub-contract would be?

A. That is right, Your Honor. In preparing this bond, when we went to the surety company—it was the General Casualty Company in Seattle. we told them that the original—the price—basic

(Testimony of Clyde Elmer Philp.)

price on the bid was \$293,000.00. I brought my bond file with me, but I handled that all by negotiation. It was approximately in the middle of May, and I didn't have any correspondence on it.

The Court: Well I am not so much interested in that as I am the fact that you were present at a number of these conferences. You were evidently one of the major intermediaries that brought these two parties together, and if it was not for your activity they would not have even come together, although the Court is now satisfied there was an acquaintanceship existing, and it was your desire to get some more business in writing bonds from the time that the bid was opened, and the Court is now repeating a statement made before, the parties all knew then, and I am satisfied you did, that Anderson was not going to get this bid if it was left to [699] Major or Colonel Antonovich.

A. That is true, Your Honor.

The Court: And something had to be done.

A. That is right, Your Honor.

The Court: And without attempting to detail the activity, Anderson and Rushlight or his representative went to Washington.

A. That is right, Your Honor.

The Court: Now meantime you were having meetings—that is, after Anderson's return you had meetings with Anderson and Rushlight?

A. That is right, Your Honor.

(Testimony of Clyde Elmer Philp.)

The Court: Well what in substance did they say with reference to this bona fide contract?

A. Well, Your Honor, I admit, to the best of my recollection, on May 8th was the first time that I had heard of this figure of two hundred and ninety-three thousand. Previous to that time it had been three hundred thousand. When Mr. Anderson bid this job it seems that he had his plumbing and heating figured in there between three hundred and ten and three hundred thousand dollars. We had discussed, as you know—I shouldn't say that, but in bidding it is a gamble on what you can do it for and where you might make a saving if you are successful in getting the contract. Mr. Anderson and I discussed not only the plumbing and heating, but also with the sewer and water main phase, and it seemed to me there was something about lumber, and he deducted a sum of fourteen thousand dollars from the bottom of his bid. He made a reduction of fourteen thousand. I don't believe that [700] Mr. Anderson—I can't remember Mr. Anderson having any plumbing and heating bid at that time that was equal to what he had submitted, and in their discussions afterwards, Mr. Anderson returned, I was trying to see—it was approximately May 2nd when I was with him, together.

The Court: That is the first time you were with them after they came back from Washington?

A. I was with Mr. Anderson before. I was with

(Testimony of Clyde Elmer Philp.)

Mr. Anderson on April 19th. No, Mr. Anderson called me from Washington, D. C. on April 19th.

The Court: Have you a memorandum as to what he said to you?

A. Well he called me for information, to procure from Tacoma here, to ask a representative of the Chamber of Commerce, and there was another agent here in town, to get them to gather certain information and send it to him in Washington, D. C.

The Court: Dealing with his qualifications to take a bid of this magnitude?

A. That is right, and then the next notation I have is May 2nd, meeting with Mr. Rushlight and Mr. Anderson.

The Court: Where was that meeting?

A. I was over to Fort Lewis at a bid opening and I saw Mr. Anderson and Mr. Rushlight there, and we then went to the Winthrop Hotel and we met there at 4:30, and the details I remember, the construction quartermaster had asked Mr. Anderson to give him this quotation for this extra work on these boilers. Mr. Anderson went home and procured his typewriter and I believe he brought [701] paper and carbon paper—brought it down to the hotel in Mr. Rushlight's room and I sat down and they had rough drafted this proposal. I sat down at the typewriter and typed it out myself. Mr. Anderson told me he took that out and he had to re-draft that afterwards, that they were not satisfied with the prices that were submitted. They wanted lower quotations.

(Testimony of Clyde Elmer Philp.)

Mr. Lycette: Pardon, Mr. Philps, what was that date?

A. May 2nd. It was a Friday, May 2nd. Now——

The Court: The next time you were with him.

A. I have another meeting here on May 5th. I was with Dick and Eivind all day, and I can not recall why I was over there. It just slipped my memory entirely. I can't seem to place that meeting, what it was, or why I went over.

The Court: That is here in Tacoma?

A. Yes, sir, I sat down to meet Rushlight and Dick and Eivind all day.

The next time that I had any meeting with him was on Friday the 9th, May 9th.

The Court: That is the day in question.

Mr. Peterson: That is the day in question.

The Court: And that is when you say you brought them down to Tacoma?

A. I drove Mr. Hall and Mr. Rushlight to Tacoma, and we stopped and had dinner at this chicken dinner house, and then proceeded on to Mr. Anderson's house.

The Court: Well you saw them sign this sub-[702] contract then?

A. Mr. Anderson asked me the same question and I didn't. It was a proposal that Dick was giving to Mr. Anderson.

Mr. Peterson: The contract was signed on the 15th of May. Friday night was just the revision.

(Testimony of Clyde Elmer Philp.)

The Court: Did you see the proposal written up insofar as it was changed from the type-written—

A. I vaguely remember seeing Mr. Rushlight hand it to Mr. Anderson and I looked at it at the time. I do not know when that was written. Mr. Rushlight could have written it five minutes before. He was sitting over to a side by himself. Mr. Hall was between us.

The Court: Well didn't you hear any discussion there at all about why they were going to put "revised" on this proposal?

A. No, Your Honor. One of the big discussions that came in there, this bond that Mr. Rushlight had to put up cost approximately three thousand dollars in premium. Mr. Rushlight objected to that and he stated that he felt that he had already made enough concessions on this. That would mean a further reduction of three thousand dollars on his bid, on the money he was going to receive to do this contract, and Mr. Anderson then told all of us there he had another figure that he could take. As a matter of fact, I think it was Arthur Anderson that brought it up, that he had another figure that he could use which was in a hundred and eighty thousand dollar bracket—

The Court: Two hundred and eighty thousand.

[703]

A. Pardon, two hundred and eighty thousand; that he was favoring Mr. Rushlight in giving him the contract at the price he did, and at the time we

(Testimony of Clyde Elmer Philp.)

left Mr. Rushlight and Mr. Anderson hadn't still—they had not decided who was going to pay for this bond premium. Mr. Rushlight was objecting to it and Mr. Anderson, he said that Mr. Rushlight should pay for it.

The Court: Well you say this conference lasted several hours?

A. It was several hours.

The Court: Was there some discussion there as to who was the most effective influence in finally securing the major contract?

A. Well there was a conversation to that effect. Your Honor, I did not pay a great deal of attention to it. There was Mr. Hall who made a statement that Mr. Rushlight was entitled to consideration because of the assistance he had rendered, and Mr. Anderson admitted that he had given—he had given a lot of assistance in getting this thing, and Mr. Anderson himself stated he was back there with Congressman Coffee and Mr. Olsen, and they had helped in the matter. I can only recall the general text of it.

The Court: That is all the Court is interested in.

Q. Now Mr. Philp, so far as you know the figure of \$293,000.00 was written in—had already been written in this offer of May 9th by Mr. Rushlight, before he had handed it to Mr. Anderson?

Mr. Lycette: Just a minute, I want to object.

[704]

The Court: I think I will sustain the objection. If you claim it was written in before he came up

(Testimony of Clyde Elmer Philp.)

there, then the Court would be very much interested in that, of course. I assume that it would follow if they were disagreeing and he had a pen and ink there he wrote it in before——

Q. Mr. Philp, did you see—I will ask you whether or not on the way, this Exhibit 8—I will ask you, Mr. Philp, whether or not Mr. Rushlight did not tell you on the way to Tacoma the amount of his bid?

A. There was a discussion upon it that Mr. Rushlight had a bid of three hundred thousand——

Q. I mean——

Mr. Lycette: Let him finish.

A. (Continuing): He had a bid of three hundred thousand dollars, and that it seems to me that there was a reference made—and I can't tie it together, of the two hundred and ninety-three. Why that two hundred and ninety three concession was made, I don't know.

Q. Did Mr. Rushlight on the way to Seattle—from Seattle to Tacoma on May the 9th, at the chicken dinner or elsewhere, tell you that his bid was two ninety-three—two hundred and ninety-three thousand?

A. Well, I—there was a price mentioned of two ninety-three somewheres down the line. I don't remember where it was made. It was made prior to the time that we got to the Anderson house, and it seems to me that Mr. Rushlight had stated that was his furthest concession that he could go.

(Testimony of Clyde Elmer Philp.)

Q. Two hundred and *nine*-three thousand? [705]

A. Two hundred and ninety-three thousand.

Q. I will ask you, Mr. Philp, whether you know whether that two hundred and *nine*-three thousand dollars was written in there by Mr. Rushlight before he arrived at the Anderson home that night?

A. Not to my knowledge. I never saw it before. I saw it after Mr. Anderson had it.

Q. Well did you see—did Mr. Anderson—did Mr. Rushlight write that in after he got—did you see him write it in?

A. I didn't see this until after Mr. Anderson had it.

Q. But you did not see Mr. Rushlight write it in that night?

A. No, I did not. I did not observe Mr. Rushlight writing it in.

Q. The principal discussion there that night was over the question of the bond, was it not?

Mr. Lycette: I don't think you should lead him. You should ask him what it was.

Q. What was the principal discussion there that night?

A. Well, as far as I was concerned, it was who was going to pay for the bond premium.

Q. Well, what was it—what—was the principal discussion over the question of time?

A. Beg your pardon?

Q. I mean, what consumed the greater time,—what were the folks discussing there the greater part of the evening?

(Testimony of Clyde Elmer Philp.)

A. Well, there was several items up for discussion that came up. Mr. Anderson was at some length bringing out about this other low bid, and he was—I believe it was Arthur Anderson more than Eivind Anderson, was trying to have Mr. Rushlight give him a lower bid, and the matter [706] then came up about the bond premium, and Mr. Rushlight was very much against paying for that bond premium, because that would make a further reduction of three thousand dollars in his costs.

Q. Had you ever seen any prior bid from Mr. Rushlight to Mr. Anderson of any kind or character? A. No, I did not.

Q. I will ask you—Mr. Philp, you were present when you—on May the 8th—on April the 8th, when—at the bid opening?

A. Yes, I was at the bid opening on April the 8th.

Q. And I think in your affidavit you stated that you had gone to Mr. Anderson's house that day, and——

A. I was at Mr. Anderson's house at 12:00 A.M.

Q. Where was Mr. Rushlight?

A. I had dropped Mr. Rushlight off at the Winthrop Hotel.

Q. Where did you pick up Mr. Rushlight?

A. At the Winthrop Hotel.

Q. No, but you dropped him off there. Did he drive over with you from Seattle?

(Testimony of Clyde Elmer Philp.)

A. I picked Mr. Rushlight up at the Airport in Seattle and he drove to Tacoma with me.

Q. And then you went—you left him at the Winthrop Hotel?

A. I left Mr. Rushlight at the Winthrop Hotel.

Q. And then you went up to Mr. Anderson, and was the final bid sealed then?

A. Mr. Anderson was working on the bid while I was there.

Q. Mr. Rushlight did not accompany you to the building at all in making up the bid at Mr. Anderson's house?

A. No, Mr. Rushlight wasn't at Mr. Anderson's house on that [707] day to my knowledge.

Q. Now then you recall of driving then to Fort Lewis with Mr. Rushlight and Mr. Anderson?

A. Mr. Anderson and Mr. Rushlight drove to Fort Lewis with me.

Q. And they drove in your car?

A. That is right.

Q. And I will ask you whether you recall whether Mr. Rushlight asked Mr. Anderson what his bid was?

A. Mr. Rushlight was asking Mr. Anderson what the low plumbing figure was that he had used.

Q. Yes, and what did Mr. Anderson tell him?

A. Well, Mr. Anderson—there was a little kidding going on there and Mr. Anderson told him that—"why didn't you prepare a figure for me?" or words to that effect.

(Testimony of Clyde Elmer Philp.)

Q. Anderson asked him why he did not prepare a figure? A. Yes, sir.

Q. And what did Mr. Rushlight say?

A. And Mr. Rushlight said he didn't get out a close bid on this one, but if he got the job he would talk to him afterwards.

Q. He said that he did not get out a close bid on it but if Anderson got the bid Rushlight would talk to him afterwards? A. That is right.

The Court: Well, what was said in response to the direct question as to what estimate was made for the plumbing and heating in the major bid, on the way down there?

A. Well, Your Honor, I was sitting more or less [708] behind the scenes and I knew what both of them had done. I had an idea what Mr. Rushlight's bid was and I knew what Mr. Anderson had done. I couldn't reveal it to either one of them, and this little play was going on between the two of them. As a matter of fact, it is usually after a bidding that the fellows get together and they adjust their prices, and they make a concession one way or another.

The Court: Well, as a matter of fact if you had written quite a number of bonds covering contracts, and I take it you have from what you have testified, a contractor or principal contractor who assumes the responsibility of a million dollar contract, knows pretty well the break down of his contract that he is going to sub.

A. That is right, Your Honor, that is right. He

(Testimony of Clyde Elmer Philp.)

has to analyze the job. In fact, the surety company—the surety company will not go on surety bonds unless they are convinced that the contractor is able and has the experience or background to analyze these jobs, because it is dangerous if you are not able to do so.

The Court: Well, in this particular contract, was there any—before you gave consideration to the bond application, anything indicating what the major features of the job were going to cost?

A. As surety company we knew the job was running approximately—I have a letter that I wrote in for authorization for the bond and I wrote figures of six hundred thousand dollars and I later had to revise that over the telephone for a million dollars. [709]

The Court: That was for the over all job?

A. Yes, sir.

The Court: Well but for the electrical and plumbing and heating figures?

A. We had no figures.

The Court: There was no discussion with these parties—there was no discussion as to what this actual heating and plumbing figure would be?

A. No.

The Court: Where did you get this figure of three hundred and fourteen thousand dollars you testified?

A. The figure of three hundred and ten to three hundred and twelve was a figure given to Mr. An-

(Testimony of Clyde Elmer Philp.)

derson by somebody, I don't remember who it was. There was several figures from the University Plumbing of Seattle and other fellows. We felt at the time that these other parties were playing ball—that is, the sub-contractors were playing ball with other general contractors. Mr. Anderson felt it was worth a gamble to estimate his bid on the basis that he could, if he did get the job, to make a saving on letting that sub-contract.

The Court: You say he felt. I am more interested in what he said.

A. Well, we talked. I was up at Mr. Anderson's house for an hour, and Mr. Anderson—there were two particular items that we felt there could be a saving. I pointed out to him on the water main that it was a certain figure. I can't recall that exactly, now. I would judge roughly in the thirty thousand dollars, and there was also the question of the plumbing, and Mr. [710] Anderson stated that he thought he could save something on the plumbing. There was another item as I remember on the lumber, and he then—

The Court: I am not particularly interested in that. I am very much interested, though, in knowing what passed between these two men as to what the price was going to be on this sub-contract, either including or excluding the modified contract, and anything that you know in that regard that you heard, and if you can give to the Court the conversation exactly or in substance, it would be of value.

A. Well, on that May 8th meeting, Your Honor,

(Testimony of Clyde Elmer Philp.)

I do not recall of any price that entered in between the two—between Anderson and Rushlight, whether——

The Court: What did you understand they were meeting there for? You brought them down from Seattle.

A. Mr. Rushlight was giving bids to many other contractors. There was probably eight or nine other contractors bidding on this job.

The Court: That was not true on May 8th.

A. I am talking about April 8th.

The Court: You said May 8th.

A. I am sorry. On May—prior to May 8th, Mr. Rushlight had met with Mr. Anderson in Spokane. I was not there. In Washington, I was not there. No, not in Washington. I don't know about that one, but the conversation between the two, the two, Anderson and Rushlight, Mr. Rushlight wanted three hundred thousand dollars for the job. Mr. Anderson had not committed himself. This May 8th meeting was for the purpose of negotiating [711] between them to get a price.

The Court: Well of course you couldn't write Rushlight's bond until they settled their differences on the sub-contract.

A. That is right, Your Honor.

The Court: Until there was a signing of a sub-contract.

A. That is right, Your Honor.

The Court: Had you written bonds for Anderson before this?

(Testimony of Clyde Elmer Philp.)

A. Yes, sir, I had, Your Honor.

The Court: Over how long a period of time?

A. I would say a year or a year and a half.

The Court: Had you written bonds for Rushlight before?

A. Yes, Your Honor.

The Court: For how long a period of time?

A. For a longer period of time.

The Court: About how long?

A. In 1939, and that is a guess. I will just say 1939.

The Court: Well was it through the activities of Anderson or of Rushlight that you were as active as the record indicates you were, in connection with this contract? Was it Anderson more or was it Rushlight more?

A. Well, I would—I had more calls from Mr. Anderson than I had from Mr. Rushlight.

The Court: That is, if Rushlight had not gotten this contract you still would have had the Anderson bond? [712]

A. Yes, sir. As a matter of fact our company was the only one that would write this bond for Mr. Anderson.

Mr. Peterson: Just one question I want to clear up. I don't know whether the Court got the significance of it.

Q. When you went to the bid opening on April the 8th, Mr. Rushlight, I understood you to say, you asked Mr. Anderson what the plumbing figure was that he used.

(Testimony of Clyde Elmer Philp.)

A. He asked him what plumbing figure that Mr. Anderson used.

Q. And Mr. Anderson did not give him the figure? A. He did not divulge it.

Q. And at that time did Mr. Anderson or did he not ask Mr. Rushlight why he did not put in a bid?

A. Yes, he stated that he asked him why he did not prepare a figure.

Q. Why he did not prepare a figure, and what did Mr. Rushlight answer?

A. Lets see, Mr. Rushlight answered words to the effect that he did not figure this close, and that if Mr. Anderson got the job he would negotiate with him.

The Court: Well, did they talk figures at all?

A. They did not talk any figures. There was no figures mentioned.

Mr. Peterson: That is all.

Cross Examination

By Mr. Lycette:

Q. Mr. Philp, I understand that after Mr. Anderson got back from Washington, D. C., and it was known then the contract [713] would in due course go to Anderson, wasn't it?

A. That it right.

Q. Of course they did not have anything in writing that would bind the government, but through the officers or the grapevine as you might call it, they knew they were going to have the contract?

(Testimony of Clyde Elmer Philp.)

A. I made an entry in my diary that I was at Fort Lewis on April 22nd at another bid opening, and we heard that Anderson had received an award of the contract for the hospital. The award was made at Washington, D. C.

Q. Now after Mr. Anderson got back here you talked to him between the time he got back and May 9th, you talked to him I understood you to say six or seven times. That is correct, isn't it?

A. Well, I think I said that from the time the bid opening until that time.

Q. Let's say from the bid opening.

A. That is right.

Q. Met him and talked to him?

A. Yes, sir.

Q. And quite a few of those occasions were after he got back from Washington?

A. That is right.

Q. And after May 9th, even, in the next four or five days you were down to his house again with the bid bond too, weren't you?

A. After May 9th?

Q. Along May 15th, for example.

A. I saw Mr. Anderson on the 15th, May 15th.

Q. Well now, going right back to that particular time, we [714] will say May 9th, or May 15th, either, I don't care which, from all the conversations that you had had with Mr. Anderson and Mr. Rushlight, and the discussions concerning this plumbing and heating sub-contract, I will ask you if it isn't a fact that you knew from those discus-

(Testimony of Clyde Elmer Philp.)

sions that this change in the boiler house work was not included in the figure of two hundred and ninety-three thousand dollars?

Mr. Peterson: Just a minute, I object to that. That would be calling for a conclusion of the witness. That couldn't possibly be binding upon the Court.

The Court: Objection overruled.

A. It was my understanding from both their understandings that the boiler house change was—figures was not included in this two ninety-three.

Q. As a matter of fact, at some—long before this trial ever started, or before there was ever any suit filed, something occurred which caused you to think Mr. Anderson was going to try and make that a contention and you told Mr. Rushlight that, did you not?

Mr. Peterson: Just a moment, I object to that, Your Honor please.

The Court: Objection overruled.

A. Yes, sir, I did. I told Mr. Rushlight that Mr. Anderson was going to have the two ninety-three as the total price for the job.

Q. Now, before the evening of May 9th closed, before you left the house there, whether it was on May 9th or several days prior thereto, you knew that the discussion between Anderson and Rushlight was whether the contract price [715] would stay or be at three hundred thousand dollars, or some lesser figure?

(Testimony of Clyde Elmer Philp.)

Mr. Peterson: Just a minute, what date is that?

Mr. Lycette: I am leaving it open to him, because I don't know which one.

Q. Now some time before you left Anderson's house on May 9th, is that correct?

A. That is right, prior to May 9th Mr. Rushlight had wanted to receive three hundred thousand dollars for this job and he was very much perturbed. He thought Mr. Anderson was going to let the contract to another plumbing and heating contractor.

Q. Now didn't Mr. Anderson tell you that he had a letter, contract, or letter bid along about May 5th from—I think it is in evidence right here.

Mr. Lycette: Strike that question and I will start over again.

Q. I will ask you, Mr. Philp, if you did not know about May 5th or 6th, or 7th, along in that area, from Mr. Anderson himself, that he had received a written proposal from the firm of Lord and Hasdorff to do the contract work for two hundred and eighty-six thousand dollars?

A. To the best of my remembrance it was on the meeting of May 9th when that came up.

Q. Well is it your recollection that on May 9th he advised Mr. Rushlight and Mr. Hall and yourself there that he had this figure of two hundred and eighty-six thousand dollars?

A. He said he had a figure that was much lower than Mr. [716] Rushlight's.

(Testimony of Clyde Elmer Philp.)

Q. Did he tell him the exact amount or do you recall?

A. I don't remember. I can't remember if he said the exact figure—whether he said two hundred and eighty.

Q. Did you on that day or some prior day, one or two days prior thereto, tell Mr. Anderson that he couldn't renege on his arrangement with Mr. Rushlight, and that he had to go through and give that to Mr. Rushlight because that was the fair thing to do?

Mr. Peterson: I object to that, Your Honor please.

The Court: Where was this conversation supposed to be?

Mr. Lycette: I don't really know myself, Your Honor.

Q. Did you have such a conversation as that, first, and then tell us where.

The Witness: Your Honor, on May 15th, Mr. Rushlight had got this contract on May 8th—hadn't got the contract, but on May 9th they had finally arrived at this figure of two ninety-three with the bond premium question left up in the air. Mr. Anderson prepared the contracts as I—I presume he mailed them to him. In any event, on May 15th I was at Fort Lewis at another bid opening and I saw Mr. Anderson there about 4:00 o'clock. Mr. Anderson had been waiting for Mr. Rushlight to return the signed contract together with a surety bond. I had been in touch with Mr. Rushlight and

(Testimony of Clyde Elmer Philp.)

understood Mr. Rushlight was going to be there with him that day. Mr. Anderson showed me a bond of this Lord—I thought it was [717] Lord & McRae, but it was Lord and Hasdorff, that they were willing to enter into the contract immediately, and I told Mr. Anderson that we—that both of us owed Mr. Rushlight a good deal in getting this job; that we should not forget it; that if Mr. Rushlight did not want the job he should tell us, and I was sure he was at Fort Lewis, and that he would not do anything until I had an opportunity to go and look for him and come back to the job site. I found Mr. Rushlight over at the construction quartermaster's office. He was over there taking care of some of the details, and the three of us went to—I haven't got it here, whether we went to his home or sat there and talked, but at that meeting Rushlight finally conceded that he would pay the bond and would sign the contract. As I recall, we went to Mr. Anderson's house; that Mr. Rushlight signed the contract and then the next day we went to the surety company and arranged for Mr. Rushlight's bond on Saturday, May 17th.

Q. This conversation you just talked about, was it May 15th? A. May 15th, 16th, and 17th.

Q. Going back to May 9th, because that is what we are most interested in, on May 9th, that evening, there was a discussion then about this bid of—low bid of Hasdorff—Lord & Hasdorff, wasn't there? A. That is right.

(Testimony of Clyde Elmer Philp.)

Q. There at Anderson's house?

A. I do not believe I knew the other name at that time. I didn't know the name until May 15th.

Q. But it was talked about, the bid itself was talked about?

A. Yes, the discussion in particular came up with reference [718] to the paying of that bond premium.

Q. I understood in your original testimony on direct you testified that that evening they negotiated about the amount of the price for this job, on May 9th.

A. That is right.

Q. There at the home, and May 9th was the first time you had ever heard of the price of two hundred and ninety-three thousand dollars, was it not?

A. To the best of my recollection.

Q. Prior to that time, so far as between Anderson and Rushlight was concerned, it had been three hundred thousand dollars?

A. It had been three hundred thousand. Rushlight wanted three hundred thousand and Anderson had not committed himself.

Q. So far as this exhibit No. 8 is concerned, which was the proposal which was finally submitted on the evening of May 9th for two hundred and ninety-three thousand dollars, it was your understanding I think, that that did not include the revision of the boiler house?

A. There was no revision of the boiler house.

(Testimony of Clyde Elmer Philp.)

Mr. Peterson: Object to that and move to strike his answer.

The Court: Objection will be overruled.

Q. Now the matter of your being here as a witness, Mr. Philp, your office is still in the 1411 Fourth Avenue Building, is it not?

A. Yes, it is.

Q. And that is on what floor, there?

A. On the 11th floor. [719]

Q. And that is where the office of the Continental Casualty Company is? A. Yes, sir.

Q. You were an agent of the Continental Casualty Company, and you still are, are you not?

A. Yes, sir, that is right.

Q. And you have been from the period 1941 straight up to the present time?

A. That is right.

Q. You have been in the office substantially all the time except when you may make a trip down to Portland or over to Tacoma during the past year?

A. I would say fifty per cent of the time.

Q. And you are in and out of the office of the defendant Continental Casualty Company a half a dozen times a day are you not?

A. No, sir, I don't have very much more surety business.

Q. Your office was right in their office until what time?

A. It was about a year ago, last March.

Q. That would be March, 1943, would it not?

(Testimony of Clyde Elmer Philp.)

A. No, I have been out of there about six months—approximately six months.

Q. You have been out of the main office of the Continental Casualty Company about six months?

A. About six months.

Q. Prior to that time you were right—

A. I had my office with them.

Q. You used their telephone as your telephone?

A. Yes, sir.

Q. You still list—if you are not in your office or no one [720] there, you list the number of the Continental Casualty Company there?

A. That is on the door, there.

Q. Did Mr. Anderson or any one connected with the defendant Continental Casualty Company talk to you about appearing as a witness in the first trial of this case? A. No.

Q. Nobody came near you? A. No.

Mr. Lycette: I think that is all.

Mr. Peterson: Another question or two.

Redirect Examination

By Mr. Peterson:

Q. Mr. Philp, had you been present at any meeting of Mr. Anderson and Mr. Rushlight prior to this job?

A. On February 7th I was down in Portland with Mr. Mullen and Mr. Mackery, and Mr. Whetman and Mr. Anderson and they were bidding on the Pendleton project, Pendleton Air Base. I don't know whether that bid went in on the 7th or on

(Testimony of Clyde Elmer Philp.)

the 8th, but Mr. Rushlight was in our hotel rooms at that time, after the bid opening.

Q. And Mr. Anderson?

A. Well, I presume Mr. Anderson was there. I don't remember sitting down and shaking hands or anything, but I know both of them were there.

Q. And Mr. Rushlight put in a bid at that—

A. Mr. Rushlight had submitted a bid to the combination that was bidding that job.

Q. And Anderson was one of the combination?

[721]

A. He was one of the partners on the job.

Q. You knew they were acquainted before this job?

A. Well I knew that they knew each other. I didn't know if they had been introduced to each other, or anything like that. I did know they had known each other.

Q. Now then, Mr. Philp, I understand as late as May 15, 1941, Mr. Anderson was threatening to give the job to Lord & Hasdorff in Portland?

A. On May 15th, Mr. Anderson had in mind of giving the job to Lord & Hasdorff.

Q. And they had furnished the bond, had they?

A. They had given Mr. Anderson a surety bond.

Q. And it was on that date that you persuaded him to hold off until you could contact Rushlight?

A. That is right, sir.

Q. Now then, Mr. Philp, did you know that on May 7, 1941, that Rushlight and Anderson had

(Testimony of Clyde Elmer Philp.)

ordered the boilers for the revision of the boiler house?

A. Well, as I understood on May 5th at the meeting that we had worked on that proposal to the construction quartermaster, Anderson, to facilitate the purchase of this, had agreed to buy those boilers.

Q. But did you know that Mr. Rushlight had signed an order for those boilers on May 6th or May 7th?

A. No, I had no knowledge of that.

Q. You did not know that? A. No.

Q. And the revisions had—did you know that the revisions of the boiler house had all been agreed upon between Anderson and the government prior to May 9, 1941? [722]

A. Are you talking about the prices?

Q. And the revisions, and the actual revisions?

A. Well the government had—the government had the revisions in mind when they were talking to Mr. Anderson on May 5th, but to what I know, those prices were not agreed on until after May 9th, the prices.

Q. The prices of what?

A. The prices of this change on the boiler house.

Q. Well, you knew that—you knew that Mr. Rushlight had submitted them to Mr. Anderson I think on May 5th?

A. The prices that Mr. Rushlight prepared

(Testimony of Clyde Elmer Philp.)

there, was for Mr. Anderson to submit to the government.

Q. And not information between him and Mr. Anderson?

A. I didn't see any prices where Mr. Rushlight gave them to Mr. Anderson as a sub-contractor.

Q. That is what I thought. Now that was so Mr. Anderson could submit them to the government?

A. That is right.

Q. Now then,—then, did you know that prior to May 9, 1941, that is, on May 6th or 7th, did you know that Mr. Rushlight had ordered those revised boilers?

A. No, I had understood Mr. Anderson was ordering those boilers.

Q. And did Mr. Anderson ever tell you that the two ninety-three did not include the revisions?

A. Well, I do not believe—Mr. Anderson has never committed himself on it.

Mr. Peterson: That is what I thought. That is all.

Mr. Lycette: I have no further questions. [723]

The Court: Well, when you wrote the bond, of course you wrote the bond based upon this Plaintiff's Exhibit No. 7, which is the contract between the sub-contractor and the principal contractor. You may look at that (handing exhibit to witness). Your bond I presume was for the performance of that sub-contract.

A. That is right.

(Testimony of Clyde Elmer Philp.)

The Court: Well, did you interpret that in its provisions or anything in it as including anything more than that what is in it, what we might term for lack of a better word, the master contract or the big contract with all of its plans and specifications?

A. No, we interpreted this, Your Honor, as covering the master contract itself.

The Court: And not the boiler revisions?

A. There was no revisions of any kind we considered in here, as a surety.

The Court: And you were paid your premium by the sub-contractor?

A. On the bid of two hundred and ninety-three thousand dollars.

The Court: Now, if that suggests any further questions.

Redirect Examination (Resumed)

By Mr. Peterson:

Q. And he had never paid any premium on any other amount?

A. Well, the surety applications call upon an advance premium as indicated by the contract. Then if there is any revisions or changes in the contract, the contractor is [724] entitled to a return premium if the prices go downward, and if the prices go up, they get an additional premium. In this case, if Mr. Anderson pays Mr. Rushlight in excess of two hundred and ninety-three thousand, Mr. Rushlight is required to pay the surety company additional premiums.

(Testimony of Clyde Elmer Philp.)

Q. Has he paid any additional premium?

A. Mr. Rushlight has only paid a premium of \$2930.00.

Q. That is on two hundred and ninety-three thousand? A. That is right, sir.

Mr. Peterson: That is all.

The Witness: Your Honor, if I may explain that, we get, as far as the surety is concerned, we get the final returns on a sub-contract what a sub-contractor earns, rather, from the general contractor. He writes us back and tells us the sub-contractor has performed his job—he has accepted it in its entirety, the final contract price is so much, and from there we base the premiums on increased or decreased. In the case of a contractor, we get that information from the contracting officer, and in this case we haven't received anything from Mr. Anderson.

The Court: Because of the dispute and the litigation?

A. That is right.

The Court: Anything further?

By Mr. Evenson:

Q. Following this, I was curious about one thing, Mr. Philp. There is an Exhibit 6 here that suggests that the govern- [725] ment accepted the boiler house changes verbally on May 6th.

A. Well, they——

Q. Were you aware of that?

A. Yes, sir, I was, but not the prices. I under-

(Testimony of Clyde Elmer Philp.)

stood that the prices were not accepted until some time later.

Q. By the government?

A. By the government. There is a revision of prices in there—now I may be in error, I am not sure, but it seemed to me that there was; that the figures that we prepared for Mr. Anderson on that night was taken to Antonovich. He turned them down and they had to revise them afterwards, and I thought it was a period of time.

By Mr. Peterson:

Q. Well, Mr. Philp, if the government actually on May 6th had agreed fully on the prices, and agreed on the work to be done, would you still say that that was not included in the subsequent contract?

Mr. Lycette: Just a minute, I will object to what the contract calls for. This contract, as Your Honor will probably recall, the sub-contractor specifically—not specifically, deliberately omits to mention the new specifications, which are separately paragraphed, numbered, paged, labeled and everything else. They are not named there at all.

The Court: The witness may answer the question.

A. Well, it was my understanding that that price of two ninety-three did not include any boiler house.

Q. Well I understand, but if the government on May the 6th [726] had agreed on the price of the revision and had agreed on the exact revisions to be

(Testimony of Clyde Elmer Philp.)

done, and then on the 6th or the 7th, the day after, the parties had ordered the revision items, would you still say that the revision items were not in the subsequent Anderson contract?

A. My understanding it was not.

Q. Well Mr. Philp—

A. I might clarify that in one thing, I do not believe there—I think there was not a meeting of minds, but Mr. Anderson did not commit himself. Mr. Rushlight stated that his bid was for the master bid.

Q. When did he state that?

A. When we left the house at this meeting of May—of May 9th. I told Mr. Hall and Mr. Rushlight that this revision had not been included in the conversation, and I said that thing should be clarified, because I know that you do not include that in your bid of two hundred and ninety-three thousand dollars.

Q. What did you understand the revision had not included—what did you understand the word “revised” to be on this May 9th—

A. Well he had an original bid of three hundred thousand and I can not get the difference of why it came down from three hundred thousand to two ninety-three.

Q. But Mr. Anderson had—you just testified that Mr. Anderson never committed himself to three hundred thousand.

A. That is right, Mr. Anderson had never committed himself to any figure, other than when this

(Testimony of Clyde Elmer Philp.)

two ninety-three was set up and he prepared a sub-contract.

Q. You did not discuss the question of the revised work, you [727] say, at this May 9th meeting?

A. You are speaking about the boiler house?

Q. Yes.

A. Well there was nothing brought up at that meeting about this boiler house.

Q. All right. You knew the boiler house—the revision in the boiler house called for considerable work, other than to be done by Mr. Rushlight?

A. I—as I remember, it was—it was concrete work in there Mr. Anderson had to do.

Q. Did you know that on May 7th, he had let that sub-contract for that, for the construction of the boiler house—the revised boiler house?

A. No, I did not know.

Q. You did not know that Mr. Anderson had let the contract on May 7th for that?

A. No, I did not know anything about it.

Mr. Peterson: Your Honor, we will just have a few questions after lunch.

The Court: Then do you have any other witness?

Mr. Peterson: There may be, just very brief, Your Honor. It would be very brief. I don't think it would take us over half an hour.

The Court: Do you have any testimony, Mr. Lycette?

(Testimony of Clyde Elmer Philp.)

Mr. Lycette: No, sir.

The Court: Very well, we will take an intermission until 1:45.

(Recess) [728]

1:45 o'clock p. m.

The Court: You may proceed. You may take the stand again, Mr. Philp.

Mr. Peterson: I don't think I have any more questions, Your Honor.

The Court: Very well.

The Witness: Can I be excused, then?

The Court: No, I think you better remain.

Mr. Peterson: Mr. Anderson, will you just take the stand for a question or two?

EIVIND ANDERSON,

produced on behalf of the Defendants, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Peterson:

Q. Mr. Anderson, directing your attention to the fall of 1940, will you state whether or not you had any meeting with Mr. Rushlight at the Winthrop Hotel at that time, and if so, under what circumstances?

A. Yes. I recall there was an incident there where I was down there.

Q. How did you come to go to the hotel?

(Testimony of Eivind Anderson.)

A. Oh, I was called by Rushlight.

Q. On the 'phone or how?

A. On the 'phone, to come down there and meet a Mr. Pugh who was the estimator for the Fuller Company.

Q. Who was the Fuller Company? [729]

A. Well they are a big contracting concern from—I think they have their main offices in New York.

Q. All right.

A. Who was here estimating or bidding on some of these projects at Fort Lewis. I believe it was what they called the 750 bed hospital that was being built there.

Q. All right, what did you do in response to that call?

A. I went down there and I met Mr. Pugh.

Q. Who else?

A. Well, he had other men with him there in his staff there, but I don't recall the name. Mr. Pugh was the main representative for this Fuller Company.

Q. Was Mr. Rushlight there?

A. I think I went into the room where Mr. Pugh was. I asked Rushlight where he was located at, so I went in there and I met him and introduced myself to Mr. Pugh, and he told me that—

Q. Just a moment, never mind what Mr. Pugh told you, but did you meet Mr. Rushlight?

A. Yes, I met him subsequently in the hotel there, later on.

Q. An Mr. Rushlight?

A. Yes.

(Testimony of Eivind Anderson.)

Q. And under what circumstances?

A. Well it was in the bidding of this job. They were re-bidding it, as I recall it, and he had been told by Mr. Rushlight—he said I was a good estimator and I had been bidding on that job before, so I could assist him in getting in his figures. It was a short time they had to get the figures in. I think they had only that evening, and the bids were to be submitted the next day, so I agreed [730] with Mr. Pugh that I would work with him, and I told my son Tom to come down and assist us to get out this estimate, and in that connection we met Rushlight in the hotel there. He was up there proposing a plumbing bid in this same project.

Q. And when was that, Mr. Anderson?

A. Well, I can't recall the date there. It was, as far as I recall, it was in the late fall of 1940.

Q. You had previously bid on that same job, had you?

A. Yes, I had prepared an estimate in that job—that is, when it was formerly bid, and of course I had the information on the various types of bids that was involved there, you know, in that project that he was interested in there.

Q. Now then, Mr. Anderson, I will ask you whether you ever stated to Mr. Clyde Philp or anyone else at any time, that the revision items here covering the revision in the boiler house, both as to price and items, was not included in the sub-contract with Rushlight?

(Testimony of Eivind Anderson.)

A. No, I did not. I never stated that. I never stated that to Mr. Clyde Philp or anybody else.

Q. Was Mr. Clyde Philp with you and Mr. Rushlight to Fort Lewis on May 6th when it was approved by the government?

A. No, he was not.

Q. At that time the government accepted both as to price and to work, did they not?

A. Yes, they instructed me to proceed with the work, and handed me a letter of award of the contract, and the constructing quartermaster explained that this modification which he just received the bid on there, would be— [731] it would be confirmed in a letter to follow, and I—

Q. Mr. Anderson, was there other work in the revision of the boiler house other than what was alluded to?

A. Oh, yes, oh yes. The government works those things this way: They have specific types of buildings. Now we are speaking of boiler houses here. They have specific types. Some certain types take certain equipment, like the one that was originally in the bid of April 8th was defined as "Boiler house No. 13", and that had three small boilers in it. It was a wood frame structure, and a smaller building, the government decided that the plant was inadequate for the hospital to furnish the necessary heat, so they decided before they awarded this contract they wanted to have a supplementary bid on a Type 16 Boiler house, which was a different type of a structure. It was a steel frame struc-

(Testimony of Eivind Anderson.)

ture and considerably larger, and the arrangement of the equipment was for two large boilers—what they call high pressure boilers, and that this modification involved the entire new building—deleted the old building and put in a new building in its entirety with its equipment and construction.

Q. With reference to May 6, 1941, when did you award the contract for the construction of that new building?

A. Of the new building, No. 16, the chief item in that was the steel construction, which I awarded on May the 7th to the Pacific Car & Foundry over the telephone, and they forwarded the contract then in a day or two.

Q. After May 6th did the Type 13 building figure in the transaction any more?

A. None at all. We had no use for it any more. The govern- [732] ment deleted that part out of the contract. There was no occasion to have any figures on it, of anything.

Q. On the same day the plaster contract, so to speak, was accepted? A. Yes.

Mr. Peterson: You may inquire.

Cross Examination

By Mr. Lycette:

Q. Mr. Anderson, for the sake of the record, you were here during the entire time this first case was being tried, were you not?

A. Yes, that is correct.

Q. At that time you knew that Mr. Rushlight had seen you at the Winthrop Hotel, did you not?

(Testimony of Eivind Anderson.)

A. Yes, I—

Q. Just answer "yes" or "no". You knew that, didn't you?

A. Well, I knew it after I got refreshing my memory.

Q. Well, had you forgotten it?

A. Well I was not interested in it at the time.

Q. Now you knew at that time that you had seen Mr. Rushlight back in 1936, down in either Portland at the hotel there in connection with some job—did you not?

A. I knew I had seen him many times, but I did not want to enter into any testimony the exact date I had seen him until I had a chance to refresh my memories on those things.

Q. You knew at that time that he had given you some bids, a bid or two on some prior occasion, did you not?

A. Yes, sir, that would be connected with it, you see. [733]

Q. Did you consider it of no importance at the time when you were testifying?

A. No, I did not. I was rather cautious when counsel asked me. I kind of sort of recognized that counsel was trying to trap me into a testimony here that, following up with Rushlight's testimony that I had testified in this case that I had never met him.

Q. You were asked something about it, were you not?

(Testimony of Eivind Anderson.)

A. That is the way, Mr. Lycette, you asked me that question.

Q. And what did you say?

A. Well I said I hadn't testified that way.

Q. Why didn't you tell us then at that time about these prior times?

A. As I say, it was not brought on any farther. My attorney did not press any further questions on it, and I think counsel did not either.

Q. Now, Mr. Anderson, Mr. Urben is not here in the court room now, is he?

A. I think my attorney excused him, did you not?

Q. You had Mr. Urben here under subpoenae during the entire time of that trial for one purpose and one only, and that was to testify that Mr. Rushlight had met you at some prior time such as was described this morning. You had him here, didn't you?

A. I don't recall that he was here under subpoena. I think it was voluntary.

Q. Didn't you subpoenae him?

A. I don't recall that.

Q. Didn't you talk to him in advance about that? A. Yes, sir. [734]

Q. Wasn't he here for that sole purpose during the seven or eight days?

A. No, I don't think the trial lasted eight days, did it?

Q. Well, six or seven days, something like that. Wasn't he here every one of those days?

(Testimony of Eivind Anderson.)

A. I don't think he was.

Q. He wasn't absent more than part of one day, was he?

A. I don't really know how much he was absent, Mr. Lycette. I didn't watch that situation.

Q. Why didn't you at that time, when you thought Mr. Rushlight was in error about having met you before, why didn't you have Mr. Urben, who was here for that purpose, testify on the subject?

A. Of course I didn't direct the trial, you know.

Q. Not at all, huh? A. No.

Q. Well did you say anything to your counsel or anything about his not being called then as a witness?

A. Yes, he was called as a witness, certainly—not to testify about meeting Rushlight, that is.

Q. He did not know anything else at all, did he?

A. I don't think neither counsel or myself anticipated that that question was to be brought, about meeting of Rushlight.

Q. What else was Mr. Urben called for, then?

A. I think he was called as a matter of an expert witness on those steel smoke stacks, whether or not they were a plumbing item, or a sheet metal item, and I believe counsel concluded after the testimony of Colonel Antonovich that it was not any use of going into that any farther. [735]

Q. You had discussed this other matter with him, though? A. Which matter?

(Testimony of Eivind Anderson.)

Q. About meeting Mr. Rushlight?

A. No, I had not. I had not.

Q. When Mr. Rushlight sat on the stand and testified about his acquaintance or lack of acquaintance with you, at that time Mr. Urben was sitting here in the court room, and you knew then, didn't you, that Mr. Rushlight had taken you to Mr. Urben or vice versa?

A. Yes, I had a recollection of it, as I say, after I got to refresh my memories of it, but it did not come clear to me in that trial as to those various incidents that we had met. I was sure that Mr. Rushlight's face was familiar with me prior to April 8th.

Q. That was about——

A. I knew that—I felt sure about that.

Q. Yes. Now just on this question of Mr. Philp, did you ever go to see Mr. Philp before the trial of this case, or talk to him at all?

A. No.

Q. Or ask him if he would testify?

A. No, I don't think so.

Q. Had you completely forgotten that he was present, if he was present at the evening of May 9th?

A. You see, Mr. Rushlight——

Q. I just asked you if you had forgotten?

A. No, I don't think I had forgotten it completely that he was there. After thinking it over, I know, after thinking it over, I knew he was

(Testimony of Eivind Anderson.)

there and that is the reason I went back and confirmed that with him to find out if that [736] was not so, he was there.

Q. Well then when you were testifying here at the time you testified and your son testified, did you have in the back of your mind at that time that you sort of thought Mr. Philp was there at that May 9th meeting?

A. I don't recall now just how that question was put, but it seemed to appear to me that the question was who participated in this conference.

Q. Well did you draw a distinction then in your mind, when you were testifying as somebody participating in the conference on May 9th, and being present? Did you draw a distinction like that?

A. Yes, I knew there was more people in the house. My family was in the house as well, and we were sitting there together by a table there in the room—in the living room. Rushlight and myself and Hall and my son, I recall clearly that we were the ones that were talking about the signing up on this deal.

Q. Just to come to that one question squarely, when you were testifying here and when your son was on the stand testifying, did you at that time have any recollection at all of Mr. Philp being present on May 9th?

A. I would have got recollection of it if it had been put to me—to my mind, or a question has been put to that effect, I am sure I would have recalled it.

(Testimony of Eivind Anderson.)

Q. I am asking you at that time, not if anything had been put to you, but at that time did you have any recollection of it?

A. Well I think I covered that question by saying that after thinking it over I had a recollection that he was the one [737] that was there besides the other men.

Q. Well you now have that recollection, but at that time did you have that recollection?

A. Only faintly.

Q. Only faintly, but you had it to a certain extent, did you?

A. Yes. That is the reason I followed up on it.

Mr. Lycette: I just want to ask one more question.

Q. Mr. Anderson, you testified in this case three or four times at least, did you not, that Mr. Rushlight had never given you a bid orally or in writing?

A. On this contract?

Q. On this contract, until May 9th at your home.

A. No, no.

Q. Didn't you testify to that?

A. No, I did not.

Q. At least four or five times?

A. I did not, Mr. Lycette. I wouldn't—

Q. All right. Now I want to put this squarely to you and listen to it carefully. Did you not testify in the Superior Court of Pierce County, in the suit between yourself and Mr. Hall, which I think was about May 4th or 6th, also, not once but two or three times, that the only offer or pro-

(Testimony of Eivind Anderson.)

posal, either orally or in writing that was ever made by Mr. Rushlight to you was on May 9th?

A. No. My testimony was that the offers that was made was subsequent to May 6th, after the government had determined that I had the contract and ordered me to proceed with [738] the work. Then, first then did I become interested in awarding sub-contracts and negotiating with Rushlight or anyone else.

Q. Then it is your testimony now that it was some time after May 6th that Rushlight ever gave you any figure orally or in writing, upon this sub-contract?

A. Well, that was the interim right in there between the 9th and 6th, those three days, that took place, and as I recall my testimony, if it was put that way to me, that would be after the government had advised me that the contract was awarded and given me a letter to proceed with the work, then we did negotiate.

Q. Now, do you want to leave it now for this particular time that never before May 6th did he give you a figure, either orally or in writing?

A. I would not say that he did not. He was—he might, as Mr. Philp explained it here, been doing a lot of joshing about what he would like to have for the contract, but I never gave him any price or any offer or any comment what he was going to get.

Q. I am asking you if he gave you—if he never

(Testimony of Eivind Anderson.)

gave you a proposal orally or in writing until after the acceptance by the government?

A. I would say if you take it, Mr. Lycette, in terms that we consider it a proposal, there wasn't any.

Q. That means orally or in writing?

Mr. Lycette: Mr. Anderson, you nodded your head. The reporter can't get the nods. Did you answer that "yes" or "no"?

A. I said "yes". [739]

Mr. Lycette: Your Honor please, if you deem that of any moment at all, I would like to get those—have the reporter get his notes, because I would want to read to this witness his questions and answers to the effect that he testified squarely in the State court that on two or three occasions, that he had no proposal, either orally or in writing from Mr. Rushlight until May 9th, the day here in question out at his house. I think that that testimony—I am positive, no question about it, was given three or four times here in Court earlier in the proceedings, but that is in the records already. I would——

The Court: I understand his testimony now, Mr. Lycette, is to that effect, he had no proposal—what he considered a proposal, either orally or in writing, before May the 9th.

A. Well I don't think I made that clear to Your Honor. There was negotiation between Rushlight and myself after May 6th, and that was pro-

(Testimony of Eivind Anderson.)

duced in writing on May the 9th. That was what I intended to testify.

Mr. Lycette: I would have to get the reporter. I thought it was Mr. Anderson. I forget—

Mr. Peterson: It couldn't possibly have been an issue.

Mr. Lycette: I asked him the question two or three times and it was so. It was, of course, the same testimony he gave here earlier, and it is important unless Your Honor remembers it here.

Mr. Peterson: I have no objection to getting the testimony, but that case involved different issues altogether. They wouldn't go into details.

[740]

Mr. Lycette: I asked him the question clearly.

Mr. Peterson: If you have any contrary testimony in the former trial lets get it out. :

The Court: How long were these people at your home on the evening of May the 9th, Mr. Anderson?

A. Well, Your Honor, I couldn't specifically say.

The Court: I would not expect you to say exactly.

A. It is to the best of my recollection that they came there somewheres between 8:00 and 9:00 o'clock in the evening, and I don't think it could have lasted more than an hour or an hour and a half, because I know I went to bed—I was working part of those days and I wanted to sleep and there wasn't really much to talk about.

(Testimony of Eivind Anderson.)

The Court: Who was it that came there to your house?

A. Well, Mr. Hall, Mr. Rushlight came to the house, and Mr. Clyde Philp was with them. The rest of us was in the house prior to their coming there.

The Court: The three of them came there?

A. Yes they did.

The Court: And did you discuss anything other than this sub-contract?

A. No, and the bond. That was the material—there might have been some side issues, of talking, kind of visiting forth and back, you know, what happened on certain contracts and so forth.

The Court: Well you were not in full accord [741] on both sides.

A. It seemed to me we were in full accord.

The Court: Well why would you spend an hour or an hour and a half if you were in full agreement?

A. Of course I had to wait until he got ready to go.

The Court: My recollection of your previous testimony was that you considered that this bid was around \$286,000.00 and that this revision or modification of the boiler house should add another \$7,000.00 to it.

A. That is the way we agreed coming in from Fort Lewis.

The Court: That was your position in the matter.

(Testimony of Eivind Anderson.)

A. Well—

The Court: Of course the other side testified quite the contrary.

Mr. Lycette: He did not testify that evening. He testified there was no discussion about price. His testimony and likewise his son's testimony was that when they came there that evening two hundred and ninety-three thousand dollars was all agreed upon before that time.

A. Your Honor, that is correct, that was my testimony and that still is my testimony there was no discussion about changing the price. We already were set upon the proposal, because the price was on the proposal and it coincided with what I agreed with Mr. Rushlight three days prior to that that would be the price of the contract that I could afford to pay and he said he would take it for that price, and on the spur of that moment, [742] right following after we had that discussion, Mr. Rushlight went in and ordered the boilers that we were going to use in this new type boiler house, and made arrangements with me there to sign that contract with the Engineering Company that was furnishing the boilers so that the thing would be under way, and also gave me an order there that the amount of that,—the cost of the boilers should be charged to his account, and now—

The Court: I think that was all gone into in detail. The Court understands that the only reason it was charged to you originally was because he was

(Testimony of Eivind Anderson.)

a resident of Portland and that was out of the territory of the seller.

A. That was the explanation.

The Court: But somewhere, and I may be confused now, I thought you conceded that there should be a seven thousand dollar allowance for this modified contract on the boiler house, contending that you had an offer and could get the plumbing and heating all done for two hundred and eighty-six thousand, as appeared in the original plans and specifications.

A. Yes, Your Honor, we talked that over and came to the conclusion that that would be about the amount that it would cost. Of course I had a final——

The Court: That was talked over before that night?

A. Yes, that was talked over when we came in from Fort Lewis, and Mr. Rushlight went in and ordered the boilers. Now of course I wouldn't buy the boilers unless I knew they were to be used on the job. [743]

The Court: Well, will you let me see that exhibit that deals with the signing of this signed sub-contract? I had it here just before noon.

Mr. Lycette: The written formal contract?

The Court: Yes. Now, does this document which is Exhibit 7, which is the form of sub-contract and signed by yourself and by Rushlight Company, does that make any reference whatever when it attempts in paragraph 2 and in other places to segregate the

(Testimony of Eivind Anderson.)

work that is to be done under that sub-contract? Does it make any reference to this modification?

A. Well it makes reference in this respect, Your Honor, that we have the plans and the drawings—

The Court: Will you point out to the Court where it is?

A. It says "It is to be done in accordance with the conditions, drawings and specifications signed by the parties thereto"—that is the government, "the drawings and specifications—and form a part of a contract between the contractor and the owner dated May 6th and hereby becomes a part of this contract".

The Court: Well your contract with the government on May the 6th, did that carry in it this modification of the power house?

A. Yes it did. That was already submitted, plans had been delivered.

The Court: I am not asking whether it was submitted. I am asking you whether in the document itself. My understanding was that it was not in there at that time. It is not a question whether it was submitted or [744] not, now, because we have got to construe that instrument in connection with the instrument to which it refers, and it is in evidence here, and Mr. Peterson and Mr. Lycette, you probably know where to find that.

Mr. Lycette: Well there are two exhibits that are both after May 6th, the formal change order made a part of the contract I think is dated—

Mr. Peterson: They are both dated May 6th.

(Testimony of Eivind Anderson.)

The master contract and the revisions were both approved on May 6th by the government, and the letter is here.

The Court: What I am attempting to ascertain now is whether the reference is made in that document which is the formal sub-contract, making reference back to the prime contract, or the major contract, would show that in the major contract there was excluded this modification.

Mr. Peterson: The major contract, if Your Honor please, was signed on—that is of May 6th, and then the revision. Now Anderson's contract—the sub-contract, says that it covers all the plans and specifications signed by the government, or identified by the government; that the work is to be—the plumbing is to be done in accordance with the plans and specifications signed by the government, which was in the master contract, or identified by the government, and the plans identified by the government are seven hundred and something, here, which contain the details of the revision items, so that the revision plans would be brought in under the sub-contract.

The Court: Well, that is an important matter [745] here and I do want to get that.

Mr. Lycette: Here is one, Your Honor, one that was put in evidence here. You can see what actually happened.

The Court: Well, this one of course is dated September the 6th.

Mr. Peterson: There is one May the 7th or 8th.

(Testimony of Eivind Anderson.)

No, May the 15th. Get the one from the government on May 15th, where it tells them to proceed.

Mr. Lycette: It is dated May 14th.

Mr. Peterson: Yes, that contains the acceptance of both of them, at least the provisions. Colonel Antonovich testified on May 6th it became a binding obligation on the government—both of them. If you will read on there you will find where it covers those plans and drawings signed by the government and those identified.

Mr. Lycette: There was one other one I wanted to call Your Honor's attention to.

The Court: Is that your contention that it would be found in Addenda 1 to 5?

Mr. Lycette: No.

The Court: "Special conditions and drawings, and is further covered by specifications in Sections"—enumerating there some five or six different sections.

Mr. Peterson: They go in the old ones. They take in the old ones. The one above there refers to the work, the plumbing is to be done in accordance with the plans and specifications and drawings signed by the government, and/or identified.

The Court: In accordance with general conditions [746] drawings and specifications signed by the parties hereto or identified by the architect or engineer form a part of the contract between the contractor and the owner, dated May 6, 1941".

Mr. Lycette: Here is the one of May 23rd, Your

(Testimony of Eivind Anderson.)

Honor has one of them there, May 23rd, the change order.

Mr. Peterson: He can in six months or a year later.

Mr. Lycette: That is May 23rd, not a year later.

Mr. Peterson: We just got one the other day.

Mr. Lycette: Maybe you did.

The Court: Mr. Anderson, did you, after that meeting at your home on the evening of May the 9th, know that there was some disagreement between you and Mr. Rushlight about the performance—about first the getting of this sub-contract and the second, the performance of it?

A. No, I did not.

The Court: Well, had things been perfectly harmonious up to that point?

A. So far as I understood.

The Court: You say there was never any discussion this two hundred and ninety-three thousand was too much, or higher than somebody else you could get to do it for?

A. I don't know, there might have been some talk forth and back at the time we started negotiating about this, coming in from Fort Lewis, but I had two or three tentative figures from plumbers other than Rushlight. [747] I didn't have any from him on which I based my original estimate upon—that is, within that range. I figured I was reasonably safe.

The Court: You heard the testimony of Mr. Philp here, who is not an impartial witness by

(Testimony of Eivind Anderson.)

any means, but he was interested in both of you financially, you about three or four times as much as he was Mr. Rushlight.

A. Well, I don't know just how he is interested.

The Court: Well his interest is based upon the commissions that he got out of the bonds.

A. That is right, he had a bigger stake in my bond than he had in Mr. Rushlight's bond.

The Court: If he hadn't an interest in the bonds he would not have been a go-between between you and Rushlight, undoubtedly.

A. I don't know, that go-between, that would be an interest in Rushlight's bond, not mine.

The Court: Your testimony previously, as I recall, was that you thought he was a partner of Rushlight's.

A. Not at that time.

The Court: Or had been a partner of Rushlight's.

A. He subsequently became a partner—went in the contracting business and quit—

The Court: You mean he is now a partner of Rushlight's?

A. I don't think they are partners now. I think they are divided now, as far as the partnership is concerned, but I think probably at the time of this trial they were, or prior to that they were partners.

[748]

The Court: Is that the reason you did not call him as a witness?

(Testimony of Eivind Anderson.)

A. No, it was not altogether the reason. We really did not anticipate that this testimony here was going to take such a wide scope—take in all these circumstances and so forth, and outside of that, I don't think we at all recognized that his testimony would be of any particular value.

The Court: Well, now, I want to get this very clear. On May the 6th, 1941, had you then signed your contract with the government to do this job?

A. No, I just got an order from them to proceed.

The Court: Advising you that your bid had been accepted?

A. That is right.

The Court: And when did you get your first formal advice that you were to be given an increase in your contract by reason of the change made in the steam plant?

A. I think that—

The Court: Oh heating plant?

A. I just don't recall that, the date, but it seems to me that came somewhere in September of that year, a long time following.

The Court: Well, now is there anything in this Exhibit No. 7 which is this sub-contract agreement between yourself and Rushlight Company other than what you have indicated here in this language, "that it shall be done in accordance with the general conditions of the [749] contract between the owner and the contractor, and in accordance with the drawings and specifications" that indicates it should include this modified heating plant?

(Testimony of Eivind Anderson.)

A. No, I don't think that document there specifically calls for anything about that, except that the contract, I believe, provides that in order to change it, it must be ordered in writing and the price agreed on between the parties.

The Court: I think that is all.

Q. Do I understand, Mr. Anderson, on the evening of May 9th, according to your testimony, there was no discussion at all concerning the price?

A. No, there was no discussion because he handed me this letter with the price on. It was all written in there when he handed it to me, and there was no discussion as to what he was going to write in after he came to the house. It was on that proposal when he came to the house, and the only real discussion, as I have said, there was considerable discussion about this furnishing of a bond.

Q. I understand that, but no discussion about price at all that evening? A. No.

Mr. Lycette: That is all.

A. (Continuing): No discussion about price that I know about. That was already agreed on, and the only thing I do recall, that Rushlight asked me if I had signed that agreement with the boiler people ordering those boilers, and I said that had been taken care of.

The Court: Am I confusing Mr. Philp's testimony [750] with somebody else's, or some of these affidavits, or am I correct in this when I say my recollection is that he testified here today that he told you that you would have to go along through

(Testimony of Eivind Anderson.)

with this deal with Rushlight because the whole matter had gone too far to accept somebody else's? Wasn't there some testimony——

A. I don't recall what he testified,—his version of that. There was some testimony there.

The Court: Do you remember, Mr. Peterson?

Mr. Peterson: I don't remember any testimony along that line.

The Court: It is either in the affidavits or in the oral testimony.

Mr. Peterson: It might have been in the affidavits. As I recall, Mr. Philp testified up to May 15th Anderson threatened to cancel, and had another bond from Mr.—from Hasdorff at Portland.

The Court: No. His testimony was to this effect: that Rushlight told him on the way from Seattle to Tacoma that he had a deal with Anderson whereby he was to have \$300,000.00 on this subcontract, but that he would do the work for \$293,000.00.

Mr. Peterson: Oh, yes, that is in it, coming from——

The Court: From Philps.

Mr. Lycette: He testified also that the matter of the Hasdorff bid came up and he discussed that at Mr. Anderson's house.

A. I do fully recall, Your Honor, the incident of Hasdorff, coming in with his bid bond. He had heard [751] that Rushlight was contending for the job at the time after I had been awarded the contract from the government, and that he told me

(Testimony of Eivind Anderson.)

that he felt sure that Rushlight would not be able to furnish a performance bond, so, he also knew that I was anxious to get going with the job—I couldn't wait. I had to start my performance immediately because the time was so short I couldn't afford to fool around.

The Court: Mr. Anderson, why didn't you, when this contract was formally signed on the 15th of April, so as to put this matter completely at rest concerning the modified major contract, write in there something to that effect so there would have been no room for misunderstanding?

A. I think, Your Honor, there might be some sort of a negligence there in the matter of writing this up, but the reason of that was, I could plainly see that we had gone through this—we had talked the boilers that we was going to use and the only boilers we could *us* in this project was already purchased and on the way, and naturally, if that contract was enforced literally as it is written there, he would have to put in three boilers of the small type under the old provision of the bid—called for bid or specification. Now that was out so there was no place to put it. We had no use for them and I think therefore that was the reason there wasn't any further writing written in there.

The Court: But your testimony in the previous hearing and on this trial was that you relied very heavily on that word written in in longhand "revised", and if it [752] became a material matter on

(Testimony of Eivind Anderson.)

the 8th or 9th of May, a week later when the formal instrument was signed by both parties, then it would seem to the Court that it would have been so much more important that it be covered in some manner.

A. I think, Your Honor, that that was brought up by Mr. Rushlight himself, and personally I don't think we saw any great significance in that word "revised", inasmuch as we had already made this revision, as far as it goes. The boilers was on hand and we naturally had in mind that we were going to use those boilers.

The Court: While the matter of the word "revised" was brought up by him, you are very far apart as to what you intended. He said he wrote the word "revised" on there because of the wide difference you had in the original contract between \$286,000.00 and \$300,000.00 and you virtually split the difference and settled on \$293,000.00.

A. If I am not correct, I think his explanation was that this word "revised" was a price that he had bid with me prior to April the 8th, and of course I had no knowledge of such price that he had bid with me. He never spoke of it, and of course there wasn't any.

The Court: I have no recollection of testimony in the record to that effect. Now if there is—Rushlight's testimony was not to that effect.

A. I believe we have a transcript of that.

Mr. Lycette: What was that?

A. What the word "revised", that was for.

(Testimony of Eivind Anderson.)

The Court: Mr. Anderson's statement was that [753] Mr. Rushlight's testimony was that the word "revised" was written in there to comply with his bid of \$293,000.00 that he——

Mr. Lycette: I did not understand the testimony to be that at all.

Mr. Peterson: As I recall, Rushlight claimed that the word "revised" meant a revision in the price.

The Court: That is correct according to my recollection, but I have got some notes that I kept because it is the contention of Rushlight, that Anderson, who had promised him orally if they got the job he would get \$300,000.00 for this sub-contract, which was a very liberal allowance, but in view of the fact that it took considerable effort to get this contract, and both parties engaged in that effort, he was to get three hundred thousand,—I am quoting now Rushlight's testimony—and that after the government had awarded to Mr. Anderson this contract as being the best bidder, due to the steps that were taken in the intervention had in Washington, then Mr. Anderson advised Rushlight that he could get this work done, the plumbing and heating, for \$286,000.00 by competent sub-contractors, and that Rushlight insisted that he should have the \$300,000.00, and that that issue was not finally settled until the night of May the 9th when they went to Mr. Anderson's house and it was settled by splitting the difference between three hundred thou-

(Testimony of Eivind Anderson.)

sand and two hundred and eighty-six thousand, resulting in \$293,000.00. According to both parties, nothing was said in this meeting as to this revision, but they were discussing the contract as a whole. Now, one might have [754] drawn one inference and one another. The only witness, who was not a disinterested witness at all and unfortunately was not called before, and there is a sharp conflict appeared by these affidavits that could have thrown additional light on it, was the witness who was brought in here today, and neither party to the litigation saw fit to advise the Court he was present, and of course his testimony is to the effect that he does not know whether the minds of the parties met. In his judgment this \$293,000.00 was meant, so far as Rushlight was concerned, was for the principal contract, and defendant Anderson thought it covered the whole contract, and that is why I asked these questions. There was enough difference there, adopting either theory in the Court's findings prior to the time it adopted the theory of the plaintiff, unless the plaintiff's conduct in his testimony here is of such a nature and such an extent that it would warrant the Court in disregarding his testimony and discrediting him on those things, the evidence is very convincing that there was not a perfect harmony prevailing between these parties subsequent to the assurance of getting the contract. There is very sharp conflict in the testimony as to how this trip to Washington had happened to be taken and who defrayed the expenses, and where

(Testimony of Eivind Anderson.)

they lived and who they saw and what contacts were made that resulted in the awarding of this contract, but all of this led the Court to make its inquiry that I did just a few moments ago as to why, when the formal instrument that finally depicts the obligations of the parties insofar as it could be done, in writing, which was the signing [755] of the sub-contract and the furnishing of a bond, made no reference whatever to a changed condition that substantially increased the cost of this construction, and of course you say, Mr. Anderson, that there was in your mind nothing in the situation that aroused any suspicion on your part?

A. Well of course, I say so, by reason from a layman's standpoint. Naturally there could be, if it was a legal individual that had analyzed this fully and thoroughly, but as far as my convenience or necessity in this contract, that was all I was looking for and it seemed to be all there.

The Court: But it is not a matter of layman or professional, whether people are agreeing or disagreeing.

I think that is all.

Mr. Lycette: May I ask just one question in view of Your Honor's question?

Q. Mr. Anderson, did you at any time give Mr. Rushlight an order separate and distinct from the sub-contract itself, that printed form of sub-contract Exhibit—

The Court: No. 7.

Q. (Continuing): —No. 7, to do the boiler

(Testimony of Eivind Anderson.)

house work? Did you give him a separate and distinct order?

A. No, I did not.

Q. Why didn't you?

A. Because I did not figure he had one coming.

Q. Well, did you think it was covered by your sub-contract so there was no occasion to give him a separate and distinct order?

A. That is right—that is right. [756]

Q. You gave him one in writing, didn't you, and told him "There is your order to do the work", and gave it to him after this contract had been signed—did you get that?

A. As it applied to his sub-contract there was a letter—I recall that there was a letter that came in following that I was more or less confused on, and I thought he had been confused himself in his mind. He mentioned about a verbal order to order the material. I didn't give him any verbal orders, so I wrote him a letter there and tried to express myself that the work that had been agreed on was to be done that way and to proceed with the work, with the intent of executing the contract.

Q. Isn't this what happened, on May 22nd, some seven days after your contract with Mr. Rushlight had been signed, you wrote him this letter "In reply to your letter dated May 21st, you are advised that the government has approved the changes in the power plant of the four hundred bed hospital project at Fort Lewis in accordance with my proposal submitted May 2, 1941. This change

(Testimony of Eivind Anderson.)

involves a revision in mechanical equipment, including change in foundation of boilers. You are hereby instructed to make the necessary changes to the mechanical installation involved by the government's change in the government plans and specifications as may be affected by your sub-contract". Didn't you tell him that in writing seven days after your contract had been signed?

A. I think that May 2 is in error.

Q. Forgetting the May 2, it may have been something else, but you gave him that order in writing?

A. Yes, sir, I did. I thought that would answer his inquiry [757] there, and as I understood his inquiry was whether he was safe to go ahead using this type of equipment that he had already bought.

Q. Well, Mr. Anderson, if you thought that his work was covered—this revised or changed boiler house work was covered by his sub-contract, why didn't you tell him by letter "this work is covered by your sub-contract," instead of telling him "You are hereby instructed to proceed with changed work insofar as it affects your sub-contract"?

A. Mr. Lycette, it is evident that if I had grasped what he was actually leading up to there, I would have used stronger language in that letter.

Q. Well was there anything concealed from you in the letter to which he referred, dated May 21st: "We understand that you have now received formal approval covering the change in the power plant

(Testimony of Eivind Anderson.)

of the four hundred bed hospital project at Fort Lewis. Inasmuch as you have verbally instructed us to proceed with the ordering of material of the power plant as revised, we would appreciate a change order from you covering the additional costs of this work, and instructions to proceed with the construction of the power plant as revised,—and then didn't you immediately following that, write him the letter which I read to you, telling him "You are hereby instructed to go ahead on this basis so far as it affects your sub-contract—so far as the changes in the government plans and specifications may be affected by your sub-contract"?

A. What seemed to have confused me there about that verbal order—which I had never given him a verbal order—

The Court: Are these two documents you read [758] from identified in this record?

Mr. Lycette: Yes, one is Exhibit 10. That is Rushlight's letter, and the next is Exhibit 11—Plaintiff's Exhibit 11, Mr. Anderson's reply to it.

You must realize that I have never argued this case to Your Honor on this point, and there are a lot of things—

The Court: I knew these were in the record, but you did not make reference to them. I wanted them identified.

Q. Then following that, within four or five days after giving that order to proceed with these revisions, Mr. Rushlight gave you in writing a state-

(Testimony of Eivind Anderson.)

ment of the cost in so many dollars and cents. You never said a word about it, did you?

A. Yes, I did.

Q. Didn't you testify here that you never replied to that—you completely ignored it?

A. That is right, I didn't reply to the letter, but I replied verbally at Fort Lewis, and I used pretty strong language there to let him understand. I wouldn't repeat it, but I told him in no uncertain terms that there was no extra coming out of that; that he had his contract for all that the traffic could stand, and that we had agreed on; there was no order to expect from it.

Q. Mr. Anderson, when you were asked that question before at the first trial of this case, why didn't you tell us that you had replied to him verbally? A. I did. I did.

Q. You swear that you told us you replied to that verbally? [759]

A. Yes, sir, I did. I want to point out, **Mr. Lycette**, since you have those correspondence that on July the 2nd Rushlight told me—wrote me again calling attention to this change order, that he had not received. There was no response to that, either.

Q. Well when he wrote you in this first letter, May 21st, which was just six days afterwards, and in there not only asked you what he had from the government but also mentioned the change order and the additional costs, why, when you replied to him the very next day, didn't you consider it fair

(Testimony of Eivind Anderson.)

to tell him why there aren't any additional costs, this is covered in your sub-contract?

A. Well I thought I was going to be gentle with him. If he was confused in his mind, I didn't want to run over him like the Court said—I read in a case decided by Judge Yankwich who mentioned that a mule is a domesticated animal and therefore has an inborn right to buck once, and it really inspired me that Rushlight was confused in his mind about what some verbal orders were, and that is——

Q. There wasn't any question in your mind after reading his letter of May 21st, six days after the contract, that he expected this to be an extra item and that he expected extra pay for it?

A. No, I did not understand it that way.

Q. What did you think he meant when he asked you then to give him a formal order to proceed with this revised power plant and to cover in it the additional cost of the work? What did you think he meant by that?

A. I thought he meant if there was any possibility that the government had changed its mind and ordered some other [760] equipment to go in, and we begun to use the stuff that we had been instructed by the government to use.

Q. That might cover the material part of it. How about the cost part of it when he said the "additional cost?"

A. The material involved costs. That represented costs.

(Testimony of Eivind Anderson.)

Q. Well the truth of the matter is you realized, if you had not realized it before, on May 21st he thought that he was going to be paid extra for this revision and you just ignored it, thinking you would not say anything about it—treat him gentle, is that it?

A. I talked to him about the matter when he came up to Fort Lewis following that matter and I told him right then and there that he had to abide by the agreement and the contract we had gone through with, and that was all there was to that. We had all the material that was required in the contract, and we set out to do it the way the government wanted to have it done, and that is the basis I understood the contract was awarded on, and I think he confirmed that later on. He didn't receive an order so he couldn't be confused by my answer to that letter.

Q. You are familiar with the letter, and Exhibit 12, where he gave you the complete breakdown and then gave you the revisions on the powerplant of \$12,118.47? You are familiar with that letter?

A. Yes, I recognized then what he was leading up to in his formal letter.

Q. And that is the letter which came within ten or eleven days after the contract, that you didn't send him any reply to.

A. Well, I don't know just what you mean by "contract". [761]

Q. Well, that is the letter to which you did not reply in writing, isn't it? A. The letter?

(Testimony of Eivind Anderson.)

Q. Uh-huh, you didn't reply to it?

A. No, there was no occasion to reply to that. The information that he furnished me he was obligated to do under his contract, and he was late in doing it.

Mr. Lycette: I think that is all.

Redirect Examination

By Mr. Peterson:

Q. You saw him almost every day out there at Fort Lewis when he was on the job?

A. When he was up there. I am sure, once a week.

The Court: Mr. Anderson, if Colonel Antonovich had accepted your bid for the work on the morning it was submitted there and told you that he was going to recommend an execution of a contract following, and you were then in possession, according to your testimony previously given here of a bid from a firm that you considered competent on this plumbing and heating of \$286,000.00, would you have accepted their bid or would you have taken—still have taken Rushlight's bid?

A. I do not know. Of course, I would have to investigate them. There is considerable—

The Court: I thought you testified they were responsible and that they had done sub-contract work for you?

A. They appeared to be.

The Court: —on other jobs. [762]

A. They appeared to be, yes. Nevertheless it

(Testimony of Eivind Anderson.)

would be well to investigate them and find out about their——

The Court: I do not care to go into that, because that takes us away—was there any reason why you should give Rushlight the bid that morning after you received it?

A. Not at all.

The Court: And you had to have all these other steps that took you to Washington and down to the War Department?

A. There was no reason why I should give Rushlight the bid because he hadn't figured in the contract at the time, and I think that actually led up to——

The Court: The bonding representative was interested in getting Rushlight's bid, was he not?

A. I don't know. I think the bonding agent naturally would be interested in getting those people.

The Court: I do not care to deal in generalities, but I just want to get your own reaction to this particular case.

A. I mean he would be interested in getting—writing as many bonds as he possibly could.

The Court: He took the two of you down there together?

A. Oh, he came out to my house with a bond.

The Court: No, took you down when you submitted the bid?

A. Yes, sir, and drove me to the——

The Court: And took Rushlight also? [763]

(Testimony of Eivind Anderson.)

A. He did pick him up at the hotel. They were friends.

The Court: I want to say very frankly the Court is looking into this matter in a more practical way than a matter of friendship. This is a matter of making some money out of it—making it legitimately, but nevertheless making money. That was why you were bidding. That was why Mr. Rushlight was bidding. That is why Mr. Philp was busying himself in getting both of you down there. If there was some third party not in your group had gotten the bid, you would have been out of this. That is all.

Q. Mr. Anderson, referring to this letter, Defendants' Identification or Exhibit 3, which is a letter from Rushlight to you under date of July 2, 1941 where he says: "Eivind Anderson—Dear Sir: We propose to make the necessary revisions in the power plant for the four hundred bed hospital located in Fort Lewis in accordance with the revised drawings and specifications submitted with letter of instructions from the quartermaster for the sum of \$12,118.47. This does not include—" and then lists the work, and then he signs by A. G. Rushlight & Company, and then he says "the amount of this proposal is hereby accepted, and the amount of your sub-contract is hereby increased accordingly." Did you ever sign that?

A. May I see the letter, please?

Q. Yes (handing paper to witness).

A. No; I never signed this letter.

(Testimony of Eivind Anderson.)

Q. Mr. Rushlight in July of 1941 was seeking to get you to agree? A. Uh-huh. [764]

Q. To the increased costs of the boiler house revisions? A. Yes.

Q. Did you ever?

A. No, I did not recognize or acknowledge that letter.

Q. You never signed it or returned it?

A. No, I did not.

Q. And was your conversation, do you recall, with Rushlight before or after receipt of that letter of July 1st, or do you remember?

A. No, I do not remember.

Mr. Peterson: That is all.

Mr. Lycette: That is all.

Mr. Peterson: That is all, Your Honor.

The Court: Do you have anything you want to offer, Mr. Lycette?

Mr. Lycette: No, I don't think so.

Mr. Peterson: There is just one other item I did not think of.

By Mr. Peterson (resumed):

Q. Mr. Anderson, with reference to Mr. Urben's presence in the court, is it not a fact that he was interrogated by me concerning the various plumbing items in this contract, such as plumbing fixtures, plumbing backs—— A. That is right.

Q. That is one of the items? A. Yes, sir.

Q. And then the smoke stacks?

A. That is right.

(Testimony of Eivind Anderson.)

Q. And also on the electrical work?

A. Yes. [765]

Q. I had discussed them in your presence, had I not?

A. I believe you also included the air compressors.

Q. The air compressors and at any time had there been any discussion as to his acquaintance—or your acquaintance with Mr. Rushlight?

A. None at all.

Mr. Peterson: That is all.

Mr. Lycette: That is all.

(Witness excused.)

Mr. Peterson: That is all, Your Honor.

Mr. Lycette: If there is any question at all in Your Honor's mind, I would like somehow or other to have this testimony which was given here in the Superior Court, where I contend Mr. Anderson testified just cold, that there was no price given to him by Mr. Rushlight either orally or in writing before May 9th. Now I contend that he gave that testimony in this Court too, and when he said today—he denied it today—it is a little difficult for me to get—

The Court: Well, there is a question in my mind whether he gave it. I am under the impression he did, but it would not alter my conclusion either way.

Mr. Lycette: Then so far as I talked to Mr. Hall about it, and I am not going to put him back on the stand, I am frank to state that we discussed it, and

while he did not testify who was present, particularly at the other—at that May 9th meeting, at least whatever Mr. Philp testified to has not refreshed his recol- [766] lection, and he is not able to testify one way or another on the subject.

The Court: The Court has heretofore announced a decision in this case and then re-opened it for further hearing today, and followed that rather unusual course only because of the direct and sharp conflict in what the evidence was and what the facts are as made by the affidavits that were submitted here.

At first blush it appeared that some one had so grievously offended against the dignity of this Court and judicial procedure as a whole, that they ought to be cited for contempt for perjury or else the United States Attorney directed to proceed by indictment against them, but upon the further hearing here it does appear that the matter is not as grievous as it would indicate by a mere reading of the affidavits and a reference back to the testimony.

However, there is evidence here on both sides that can clearly be classified as evidence offered by principals seriously concerned, who were shamefully disregarding matters that ought to be given to the Court in order that a sound decision might be made. I am at a loss to explain how either of the principals here could testify as they did, at the most material meeting in this whole controversy,—that was the one at the Anderson home on May the 9th, and ignore the presence of a third person whose testi-

mony would be vital—that is, Mr. Philp, who has come here and testified today. True, he has not shown himself a partisan much on either side, but certainly, it seems to me both Mr. Rushlight and Mr. Anderson, [767] as well as Mr. Hall and the young Mr. Anderson, could not have been unmindful of that during that hour or two hours, in the home there, where sat the man that was instrumental in bringing these two parties together.

The question whether they knew each other or not, of itself—is not decisive in itself of any issue in this case, but it indirectly throws some light and offers some reason for the conduct of the parties leading up to the final steps that became the basis of this controversy, and in that regard the Court was anxious to know if a willful, intentional effort had been made upon the part of either of the parties to mislead. After hearing the testimony here this morning I am inclined to find that that is not the case.

The acquaintanceship between Rushlight and Anderson up till the time that they got into this matter was not an acquaintanceship that was so intimate nor so close that either could be charged with having a full knowledge of the other. I base that upon the statement of Mr. Anderson himself, that he thought he would recognize Mr. Rushlight's face because he had seen him before, and doubtless they had met, and doubtless they had some contacts, but they were more or less casual, and they would never have been upon this occasion in all probabil-

ity, if it had not been for Mr. Philp, the man who was sure if these two individuals became parties to the execution of this contract that he would write a bond for both of them, which he did.

Now I am not going to again go over all the things that I said when I decided this case before. I [768] will say from the testimony here today that I am convinced that if the contract had been awarded forthwith as they generally were at that time, Mr. Rushlight might have had an opportunity to take it at \$286,000.00. The odds are that Mr. Anderson would have given it to somebody else, but it was not awarded. As a matter of fact, it was lost to both Anderson and Rushlight, and then came all that subsequent history, and there the evidence is in such sharp conflict that certainly some one has departed a long way from the truth as to the motive and purpose in going to Washington—as to what was done in Washington, as to the activities had there and the advances made by Mr. Anderson. I said I did not intend to go into those things fully, but I just wanted to mention them in passing. I think two witnesses testified he gave Mr. Hall a hundred dollars for expense money, and he unqualifiedly denies that, but it is admitted at least by implication, that he paid all of the hotel bills while in Washington. Be that as it may, they both became deeply interested in the sharing of what would be the honest, legitimate profit of a million dollar contract, and Rushlight concern having a third—virtually a third of it to perform, and I reiterate what I said before, I do not doubt there

was some considerable oral discussion about what this sub-contract should be worth—probably no definite meeting of the minds. Nevertheless, when Mr. Anderson found that he had the contract and he knew that he could get the job done—the sub-contract job done for \$286,000.00, and he was not under any legal obligation, while there might have been a moral one, to give Rushlight anything [769] in connection with this, then the matter culminated in this May 9th meeting, and I am unable to find, and do not find, but rather affirmatively find that there no longer existed that degree of harmony and goodwill and accord that prevailed previously, and from the testimony of the witness who testified for the first time here today. Mr. Philp, differences existed, and while he was not as candid as it seemed to me he might be in stating what he saw and heard, because he was deeply interested in this thing, there were differences, though, and they were substantial, and were it not for the fact that this word “revised” was written across this proposal, why, the Court would have no difficulty at all in finding that the formal contract entered into some week or so later, clearly referred only to the original plans and specifications that the government put out on this job, without the modifications or changes involving the heating plant. But this word “revision” has caused considerable concern in deciding the matter, and it is still a matter of concern, and it becomes so highly important that all parties just simply tell the whole truth and conceal nothing, and avoid evasion, and which unfortunately, I do not feel that

I have had throughout this case, but I still adhere to the position that I formerly took, and I do that in the light of what took place within a week or ten days following the execution of this sub-contract of May the 15th or the 19th——

Mr. Peterson: May 15th.

Mr. Lycette: May 15th.

The Court: And then if there could have been a shadow of a doubt in Mr. Anderson's mind as to where [770] the parties were drifting, on this new item, it certainly was unqualifiedly disclosed in the written documents that are in evidence here, and without further attempting to review this—and what I have said is only to aid the parties in preparing formal and concise Findings so that if they desire to appeal they will have those Findings and the appellate court would have the views of this Court as expressed both in the previous hearing and here.

I shall have to maintain the position that I did earlier, and I shall have to deny the motion for a new trial and allow exceptions, because I do not think there is anything further, Mr. Peterson, that could be presented on a motion for a new trial. You have made it on the ground that newly discovered evidence——

[Endorsed]: Filed Oct. 17, 1944. [771]

[Endorsed]: No. 10930. United States Circuit Court of Appeals for the Ninth Circuit. Eivind Anderson and Continental Casualty Company, a corporation, Appellants, vs. United States of America, for the use and benefit of A. G. Rushlight & Co., a corporation, and The First National Bank of Portland, Oregon, a National Banking Corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed November 24, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS

For the Ninth Circuit

EIVIND ANDERSON and CONTINENTAL CAS-
UALTY COMPANY, a corporation.

Appellants,

vs.

UNITED STATES OF AMERICA for the use and
benefit of A. G. RUSHLIGHT & Co., a cor-
poration and THE FIRST NATIONAL BANK
OF PORTLAND, OREGON, a National Banking
Corporation, and W. L. REID doing business
as W. L. REID COMPANY.

Appellees.

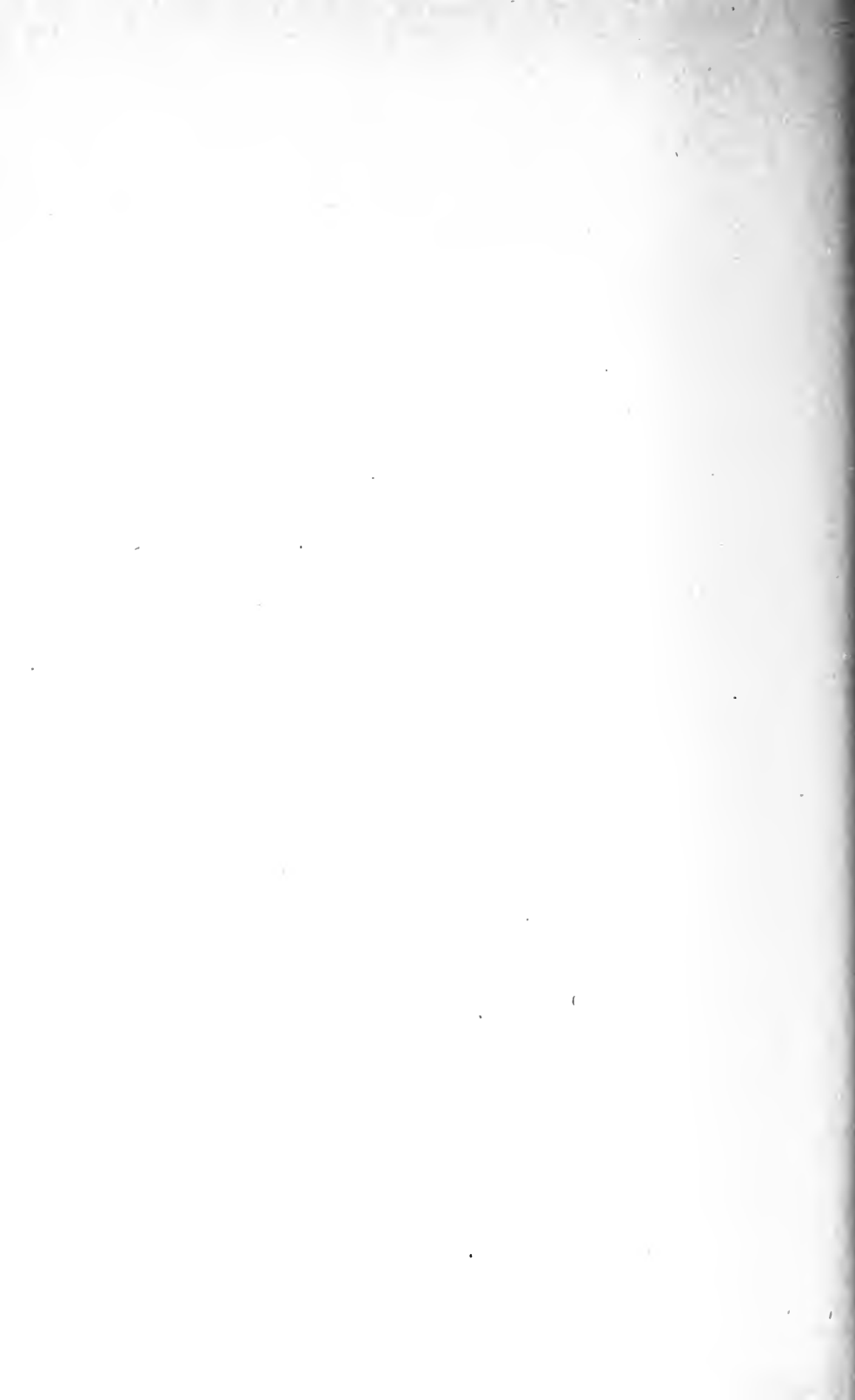
UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF WASHINGTON
SOUTHERN DIVISION

CHARLES H. LEAVY, *District Judge*

BRIEF OF APPELLANTS

DUPUIS & FERGUSON
Attorneys for Appellants

816 Northern Life Tower, Seattle, Wash.



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UPON APPEAL FROM THE DISTRICT COURT OF THE
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DISTRICT OF WASHINGTON
SOUTHERN DIVISION

CHARLES H. LEAVY, *District Judge*

BRIEF OF APPELLANTS

JURISDICTION

This is an action brought by a resident of the State of Oregon against a resident of the State of Washington under a written sub-contract for the installation of certain plumbing and heating work at Fort Lewis,

Washington. That the District Court of the Western District of Washington, Southern Division, had jurisdiction by virtue of the residence of the appellant within said District and by virtue of Title 28 U. S. C. A., Section 41, Sub-section 1 (b). That the Circuit Court of Appeals for the Ninth Circuit has jurisdiction of said cause by virtue of Title 28 U. S. C. A., Section 225, Sub-section (a), Paragraph "First."

STATEMENT OF THE CASE

The appellant, Eivind Anderson, is a resident of Tacoma, Washington, and for many years prior to the year 1941 was engaged in the construction business as a general contractor. The appellant, Continental Casualty Co., a corporation, is engaged in the writing of surety bonds and was the surety of appellant, Eivind Anderson, on a bond executed in connection with the contract out of which this controversy arose. Since the liability of appellant Continental Casualty Co. stands or falls on that relationship and since it asserts no separate or independent defense, its argument will be submitted jointly with appellant Eivind Anderson, and for the sake of simplicity the appellant Eivind Anderson will be called "the appellant" herein.

The appellee, A. G. Rushlight & Co. is a corporation with its principal place of business at Portland, Ore-

gon, and for many years prior to 1941 was engaged in the construction business as a plumbing and heating sub-contractor. The appellee, First National Bank of Portland, Oregon, is a national banking corporation and is the assignee of the claim here in controversy. Since the parties to the actual dispute are the appellant and A. G. Rushlight & Co., the latter will be referred to as "the appellee."

This dispute arose out of a plumbing and heating sub-contract between appellant and appellee. Pls. Ex. 7, Tr. 71.

In the trial court there were many items in controversy. However this appeal is limited to only one item, an alleged extra for revision of a central heating plant in the sum of \$12,118.47, the remaining items having been previously disposed of. Tr 27.

In response to a call for bids by the War Department, the appellant on April 8, 1941, submitted a proposal to construct a 400 bed hospital and 36 miscellaneous buildings at Fort Lewis, Washington, for the sum of \$936,517.00. Among other things included in this project was a central steam producing heating plant known as Type HBH-13, equipped with 3 low pressure boilers. Tr. 50, 59, Pl's. Ex. 3, Tr. 245, 246.

Although the bids were opened on April 8, 1941, and

appellant was found to be the low bidder, the contract was not immediately awarded. Instead on April 26, 1941, the Contracting Officer for the War Department requested the appellant to make a supplementary bid by deleting the heating plant Type HBH-13 and substituting therefore, heating plant Type HBH-16 equipped with 2 Erie City high pressure steam boilers, and certain other boiler room construction changes not in controversy here. Tr. 59, Pl's. Ex. 3.

On May 6, 1941, a supplementary proposal in the sum of \$23,142.00 was submitted by appellant to the Contracting Officer in addition to the amount previously bid on April 8, 1941. On receipt of the supplementary proposal the Contracting Officer on May 6, 1941, awarded the contract to appellant as revised by the supplementary proposal and ordered the work to commence. Tr. 64, Pl's. Ex. 5, Tr. 67, Pl's. Ex. 6.

The appellee was informed of the bid opening on April 8, 1941, and said bid opening was attended by W. A. Rushlight, the president of appellee. Subsequent to the bid opening the officers of appellee were in almost constant contact with appellant seeking a sub-contract on the plumbing and heating work, and also were in close contact with the Contracting Officer. Tr. 118, 123-125, 169, 241.

As a result of these contacts appellee was informed of the change in the type of heating plant and on April 30, 1941, offered appellant an estimate of the additional cost arising from this change. Tr. 130, Pl's Ex. 4.

On May 6, 1941, W. A. Rushlight accompanied appellant to Fort Lewis to submit the supplementary proposal and was present when the contracting officer awarded the contract and accepted the revised type of heating plant on that day. Tr. 384, 250.

There is a dispute as to what occurred on the return trip from Fort Lewis to Tacoma. The appellant testified that while driving from Fort Lewis to Tacoma on May 6th he and W. A. Rushlight agreed that appellee was to have a sub-contract for all the plumbing, heating and mechanical work under the contract as revised for the sum of \$293,000.00 and that appellee was to submit a proposal in writing to that effect. Tr. 250-252.

However, upon his return from Fort Lewis, W. A. Rushlight talked with Charles Crawford Wyatt, a sales representative of the Roy T. Early Co. in Tacoma. In this conversation Mr. Rushlight informed Mr. Wyatt that the boiler revisions were approved and placed an order for the revised type boilers. This order was effected by writing and delivering to Mr. Wyatt a memorandum reading as follows:

“You are hereby authorized to place order for 2 Erie City Boilers complete with all trim and accessories as specified and as per your letter of April 29, 1941. Formal order will be signed by Eivind Anderson for our acct. for the sum of \$16,924.00.

“Boiler to be delivered and erected for above price.

A. G. Rushlight & Co.

W. A. Rushlight, Pres.”

Tr. 207-210, Pl's Ex. 17.

It is uncontradicted that the purpose of having the order signed by appellant was to avoid Wyatt's making a sale to a Portland firm which was outside his sales territory. The result of the memo and a simultaneous phone call from W. A. Rushlight to appellant making a similar request was that appellant executed a written order to the Roy T. Early Co. for the revised boilers on May 7, 1941. Tr. 211, 213, Pl's. Ex. 17.

On May 9, 1941, appellee submitted its written proposal to subcontract the plumbing, heating and mechanical work for the sum of \$293,000.00. This proposal was typewritten but was interlined in ink in two places. The first interlineation changed the date from April 3, 1941, to May 9, 1941. The second added the word “Revised” near the top. The price was written in longhand in a place left for that purpose but there was no change made in the figures. The proposal was

signed by W. A. Rushlight as president of appellee. Tr. 85, Pl's Ex. 8.

There is a sharp dispute in the testimony as to what occurred at the meeting when the bid was submitted by appellee. Appellant and his son Arthur Anderson testified that the proposal was all written and signed when presented; that the only change made was the change in dates; that there was no discussion as to prices; and that the only discussion was whether or not appellee would furnish a subcontractor's surety bond at a cost of approximately \$3000.00. W. A. Rushlight testified that there was considerable discussion of price and that the \$293,000.00 price was filled in after the discussion. Carl C. Hall, attorney and secretary of appellee, testified that price was discussed but that he did not see the price filled in at the meeting. Clyde Philp testified that price and surety bonds were both discussed but that he did not see the price filled in. Tr. 254, 255, 221, 222, 201, 202, 444, 447.

On the day following the proposal was accepted by letter upon condition that a surety bond be furnished by appellee. Tr. 90, 91, Pl's Ex. 9.

A surety bond was furnished and the formal subcontract was executed on May 15, 1941, Pl's. Ex. 7, Tr. 71-84.

Although the sub-contract as written required the appellee to make a boiler installation, no specific reference is made to the revision in type of boilers. However, the fact that the revision had been made was known to both parties at the time the sub-contract was executed, and the proposal for the sub-contract was made. Tr. 384, 248, 250, Ex. 7.

The revised type boilers were installed by the Roy T. Early Co. under its contract with appellant and this claim was made by appellee for an extra under its contract. Tr. 253, 132, 141, 142.

No claim for an extra was made by appellee as required by the sub-contract but appellee did unsuccessfully attempt to obtain appellant's signature to an agreement to allow it an extra for this item. Tr. 258, 259, 510, 511.

STATEMENT OF QUESTIONS INVOLVED

1. Is a subcontractor entitled to an extra for installing a heating plant according to revised plans and specifications, where the revision was made prior to the date of the subcontract, was known to all the parties, and the subcontractor had agreed in writing that a third person would make the installation and that the cost thereof was to be deducted from his contract price prior to the execution of the subcontract?

Court's answer: Yes.

2. Where the subcontract provides that the subcontractor, agrees—

“To make all claims for extras of every kind and nature in writing within one week from the date that said claimed extra is incurred.”

is the subcontractor entitled to recover for an alleged extra, when no claim was filed at any time and there was no evidence of a waiver of this provision?

Court's answer: Yes.

3. Are the Findings of Facts supported by the evidence where the appellee's president, and principal witness, is contradicted by disinterested as well as interested witnesses, and by the ordinary interpretation of the surrounding circumstances, and where the witness admits he was mistaken on a matter he had testified to at least six times at the trial?

Court's inference: Yes.

ASSIGNMENT OF ERRORS

(1) The court erred in making Findings of Fact X in that the evidence does not support the Finding.

(2) That the court erred in entering judgment for appellee against appellant in the sum of \$12,118.47.

(3) That the court erred in denying appellant's motion for new trial.

(4) That the court erred in making Conclusion of Law II in excess of \$9,639.53.

ARGUMENT

The Boiler Revision Was Part of Appellee's Sub-contract and Not an Extra.

It is appellant's position that the boiler revision and change of plans were made prior to the execution of the sub-contract between appellant and appellee; that it was known to be an item in effect under the government's contract prior to the execution of the sub-contract between appellant and appellee; that the work and materials required by the revision was provided for by an independent contract prior to the execution of the sub-contract between appellant and appellee and in force at all times during the life of the sub-contract; that the work and materials claimed on were not furnished by appellee; but that prior to the execution of the sub-contract between appellant and appellee, the appellee did relieve itself of this work by agreeing that a fixed sum could be deducted from its contract price.

On direct examination the president of the appellee testified in answer to a question as to when he was given the plans and specifications for the revision as follows:

MR. LYCETTE: "Q. When was that given to you, do you recall?"

A. Well it was probably given to us along with that request from Colonel Antonovich—I would judge about the same time, about April 26th, along with the plans.

Q. Now were you given a copy or shown a copy of the revised plans which have been introduced in evidence in this case?

THE COURT: The blue prints?

Q. The blue prints?

A. Yes."

Tr. 125

On cross examination Mr. Rushlight testified:

MR. PETERSON: "Q. So then this boiler you ordered from Early is the boiler under your revisions?

A. They are the boilers called for in the substitute specifications and also included in the revision.

Q. And now then, these boilers that you ordered on the 6th of May were used in this project?

A. Yes, sir."

Tr. 150, 151

Again Mr. Rushlight on cross examination testified:

"Q. Then on April—on May 6th, did you not go with Mr. Anderson to Fort Lewis and wasn't that revision approved by the government?

A. We were at Fort Lewis several times.

Q. No, just May 6th.

A. Well I couldn't say we were there on May 6th, because I don't remember. You have a letter—will you show me that letter that governs the date of the approval. I think that fixes the date. I don't remember these dates.

MR. PETERSON: That is fair enough, let's get that. Mr. Lycette, could you help me a minute to find that letter from Fort Lewis, I think on May the 15th.

MR. EVENSON: It is Exhibit 6.

Q. All right, referring you to plaintiff's exhibit 6 from Antonovich, which confirms the acceptance of that—

A. Yes, this letter is dated May the 14th and has reference to a verbal acceptance made on May the 6th.

Q. With directions to proceed with the work?

A. I don't know anything about that verbal acceptance on the part of Antonovich. I do know, however, at times Mr. Anderson and I were talking to the government about this; that they assured us that this change would be made."

Tr. 145, 146

On rebuttal Mr. Rushlight testified:

"Q. Mr. Rushlight, you went with Mr. Anderson on May 6th out to Fort Lewis to see the construction quartermaster at the time he was advised that the powerhouse would be according to the substitute plans and specifications, did you?

A. Right close to that date. I believe that date might be the date we went out there, yes."

Tr. 384

It is clear from the admissions made by the president of appellee that prior to the execution of the sub-contract on May 15th the appellee knew of the boiler revision and that it would be required.

The conduct of appellee prior to the execution of the contract also conclusively shows that it was contemplated that the revised boilers would be installed prior to the making of the sub-contract.

Mr. Charles Wyatt, a disinterested witness, testified to a transaction with Mr. Rushlight relating to the purchase of the revised boilers.

“Q. Showing you, Mr. Wyatt, plaintiff’s exhibit 17, I will ask you—that is in three pieces—will you explain to the court what this is?

A. This first slip of paper is—you want the circumstances surrounding it?

Q. Yes.

A. Well, briefly, that is, Mr. Rushlight called me on the telephone on the 6th of May.

Q. Of what year?

A. Of 1941, and said that he either was or had been at Fort Lewis and that the alternate, which is the revision—you refer to as the revision, had been accepted and for me to wire the order into the Erie City Iron Works. I told him that I couldn’t wire them in without some sort of a written order, and he told me that if I would come up to the Winthrop Hotel that would be taken care of.

Q. At the Winthrop Hotel in Tacoma?

A. In Tacoma.

Q. Did you go up there?

A. I went up there.

Q. All right then, will you tell the court under what circumstances that order was given you?

A. Well I went up to the Winthrop Hotel and he simply wrote this piece of paper out and at the same time calling Mr. Anderson on the tele-

phone saying that I would be out to Mr. Anderson's house for a formal signature on the contract."

Tr. 208, 209

Plaintiff's exhibit 17 referred to by the witness was written on the printed stationery of the Winthrop Hotel, was signed by appellee and authorized appellant to enter into a contract to purchase the revised boilers and have them erected for the sum of \$16,924.00, which sum was to be charged to appellee's account. Relying on the written order and the telephone conversation testified to by the witness Wyatt, appellant did enter into a contract with Wyatt's principal to purchase said revised boilers.

"* * * * completely delivered and erected on foundations to be furnished by the purchaser * * * *."

Plaintiff's Exhibit 17 is in itself a complete contract to purchase the revised boilers installed at Fort Lewis and authorizing the deduction of the purchase price from appellee's contract.

Three days after appellee executed the authorization to purchase the revised boilers, which was also three days after the change had been made, it submitted its written bid to appellant. This bid was for the sum of \$293,000.00. This bid on its face, bore the word "Revised" which was the term used throughout, referring to the change. (Deft's Ex. 3.)

So that there can be no question as to when the revision of plans took place, the construction quartermaster, Colonel Antonovich, called as a witness for appellee and the man who let the contract and who made the change, testified to the date.

MR. PETERSON: "Q. * * * * Colonel, do you recall the approval of these revisions for the boilerhouse were approved on May 6th, at the time that the main contract was approved?"

A. I think that is correct.

Q. That is correct. Showing you Plaintiff's Exhibit 6, that is your letter, Colonel?

A. Yes, this is my letter.

Q. And that shows that you orally approved of the revision on May 6th?

A. That is correct."

Tr. 265, 266

And the same witness thereafter testified:

"Q. But he was authorized to proceed as under May 6th?"

A. That is right. That letter of authority is, in substance has the value of a contract.

Q. Yes, that is all right, and when the authority given, that is you say, the contract?

A. Yes."

Tr. 267

The sub-contract itself bears the date of May 15, 1941, and it is nowhere contended that it was executed prior to that date. (Plaintiff's Ex. 17.)

It clearly appears therefore that the revision was made prior to the execution of the sub-contract, that all parties were fully advised of the revision, and that appellee had agreed, in writing, that the cost of the revised boilers should be deducted from his contract.

The appellee also admitted that its contract with appellant required it to perform all the plumbing and heating work.

In answer to an inquiry by the District Judge, Mr. Rushlight testified :

“THE COURT: “And upon that issue you claim your contract did not require you to do that ?

A. Your Honor, our contract in standard opinion requires us to do *all* the plumbing and heating, and hot air heating, but it does not call for us to do any wiring.”

Tr. 142

The change in the type of boilers was continually referred to as the “revision.” The plans on which this change was shown were referred to as the “revised” plans, Pl’s Ex. 3, Tr. 59, Pl’s Ex. 4 (2d letter), Tr. 130. With full knowledge of this fact, appellee placed the word “Revised” on its written proposal to appellant on May 9th. Tr. 167, Pl’s Ex. 8.

There is also another matter which took place just prior to the making of this contract which would

strongly argue that it was intended that the contract price was to include the boiler revisions. On May 6, 1941, the day on which appellant testified the price of \$293,000.00 was agreed upon for the plumbing and heating work, including the revisions, and the day that appellee authorized the purchase of the revised boilers from Wyatt the appellant had a bid of \$286,000.00 from another plumbing and heating subcontractor, and the actual cost to appellee for its portion of the revised work was not in excess of \$7000.00, or a total of \$293,000.00. Def's Ex. A-28, Tr. 274, 275, 245.

The appellee also admitted that it agreed with appellant that he could deduct the cost of the revised boilers from its contract price. Tr. 154.

It is uncontradicted that the revised boilers were installed by the Roy T. Early Co. in accordance with its contract with appellant. Tr. 253, 151.

The appellee is now asking for and the District Court allowed an extra for an item which had been changed prior to the making of the subcontract; that was known to the parties to the subcontract; and which the appellee had agreed could be deducted from the subcontract price.

It is the universal rule that extras on a building

contract will not be allowed where it is shown that the work involved was contemplated by the parties at the time the contract was made. The corollary is more often stated; that an extra will be allowed if it is shown that the item was not within the contemplation of the parties.

The contract in question was executed in Washington and the law of Washington would normally govern. However, there does not appear to be any real division of authority on this matter so we will refer to the pertinent decisions in Washington and also those of other jurisdictions as well.

In *Black v. Miller Co.*, 169 W. 409, 14 Pac. (2d) 11; which was an action by a contractor for extras in remodeling a hotel, the Supreme Court of Washington said:

“Under these conditions the general guiding principle to be followed is: what was within the contemplation of the parties when the contract was signed? Manifestly, it was intended that a four story building, containing 156 guest rooms, should eventuate, fit for occupancy as a modern hotel. Everything essential to producing that result must be held to come under that contract; but those things not specified when the contract was made, which tend to mere beauty or adornment, to display, to ultra convenience or even intrinsic value and life of the building, if not within the contemplation of the parties at the time of entering into

the contract, if ordered by the owner or accepted with full knowledge, must be allowed as extras.”

In *Maryland Casualty Co. v. City of Seattle*, 9 W. (2d) 666, 116 Pac. (2d) 280; the Washington court in a subsequent decision to *Black v. Miller Co.*, *supra*, stated its position with regard to additional compensation on construction contracts, as follows:

“Rather, we think, the present case comes within a familiar principle of contract law which is succinctly stated in the italicized portion of the following quotation from Judge Brandeis’ opinion in *United States v. Spearin*, 248 U.S. 132, 136, 39 S. Ct. 59, 61, 63 L. Ed. 166;

‘Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered.’ ”

In *Russo et al v. Charles I. Hosmer, Inc.* (Mass.) 44 N.E. (2d) 641; which was an action by a sub-contractor against the general contractor for an alleged extra, where the extra had been allowed the general contractor by the State of Massachusetts for some work covered by the sub-contract, the Massachusetts court said:

“The removal and stacking of the old rails was included in the contract and was not an extra. Payment for doing this work was included in the unit prices that were to be paid for erecting the new

highway ground rails. The fact that the contract between Hosmer and the Commonwealth was amended by permitting Hosmer to charge and receive \$1,148.40 for this item does not permit Russo to collect this amount from Hosmer. This money was not paid to and received by Hosmer for the benefit of Russo. Russo's compensation was fixed by the contract between them, which was never modified, and Russo was not to have any additional compensation for the item in question."

In *Cyr v. Essen Packing Co., Inc.*, 195 N.E. 95; the question was whether certain water piping installed during the performance of a written contract was required by the contract or constituted an extra. The contract and specifications required the furnishing and installation of certain plumbing fixtures but did not expressly require the installation of hot and cold water piping to make the fixtures usable. The court held that the water piping was required and did not entitle the contractor to an extra.

In *Bowman v. Maryland Casualty Co.*, 263 Pac. 826 on 831 the California court said:

"Whether or not the contractor is entitled to an extra depends upon whether or not the work and material claimed as an extra is included in the contract and specifications."

In *Phoenix Bridge Company v. United States*, 211 U.S. 188, 29 S. Ct. 81, 59 L. Ed. 141; it was held that the erection of a temporary liftspan following an acci-

dent was within the contemplation of the parties and the contractor was not entitled to extra compensation.

The rule on construction of building contracts is well stated in *Merrill-Ruckgaber Company v. United States*, 241 U.S. 387, 36 S. Ct. 662, 60 L. Ed. 1058; as follows:

“The case is in narrow compass. It involves for its solution the construction of a contract, and the rules to guide such construction we need not rehearse. To its words we at first resort, but not to one or a few of them, but to all of them as associated, and as well to the conditions to which they were addressed and intended to provide for.”

The rule as to when the courts will imply a promise to pay for an extra is stated in *Hawkins v. United States*, 96 U.S. 689, 24 L. Ed. 607:

“Express stipulations cannot in general be set aside or varied by implied promises; or, in other words, a promise is not implied where there is an express written contract, unless the express contract has been rescinded or abandoned, or has been varied by the consent of the parties. Hence the rule is, that, if there be an express written contract between the parties, the plaintiff, in an action to recover for work and labor done, or for money paid, must declare upon the written agreement so long as the special agreement remains in force and unrescinded, as he cannot recover under such circumstances upon a *quantum meruit*.”

In *Fore River Shipbuilding Co. v. Southern Pacific Co.*, 219 F. 387; the majority of the First Circuit Court of Appeals held that the law will not imply a contract where there was a contract and the work was done under that contract. ,

So, in the case at bar, since the three low pressure boilers had been eliminated and the two high pressure boilers substituted prior in time to the making of the sub-contract, and was known to both parties; and was to be performed by a third party for a lump sum to be deducted from appellee's price; it must be held that a sub-contract including this work made after the change was known to all the parties would include the revised boilers. Consequently appellee is not entitled to the extra allowed by the District court in the sum of \$12,118.47.

Claims for Extras Must Be Made Within One Week

The contract provides:

Sec. 5. "The sub-contractor agrees—

- (b) To make all claims for extras of every kind and nature in writing within one week from the date that said claimed extra is incurred." Pl's. Ex. 7.

The appellee made no attempt to comply with this provision. Instead it submitted an agreement to appellant for his signature which appellant refused to sign. This agreement however, was not submitted within the one week period. Deft's Ex. A-3 Tr 156, 157.

The record is bare of any suggestion of waiver of this condition. Since waiver must be affirmatively shown it can be assumed that no waiver in fact occurred.

Under these circumstances it is appellant's position that the appellee is barred from the recovery of the alleged extra in the sum of \$12,118.47.

The claimed extra was the result of a change made on May 6, and the liability for the extra, if it was extra, would have been incurred at the latest on May 15th which was the date the contract was signed. Pltf's Ex. 7.

That would particularly be true in this case as appellee had in fact incurred the expense on May 6 by

execution of the agreement relative to the purchase of the revised boilers. Pltf's Ex. 17.

The latest date therefore for the filing of such a claim in writing was May 22d.

While many decisions deal with provisions of building contracts requiring orders for extras to be in writing, and others of a similar nature, there are few on the exact point.

The rule however is stated in "The Law of Public Contracts" by Donnelly ss 240, as follows:

"Any limitation upon the time within which or the manner in which claims for extra work shall be presented or claimed must be complied with before recovery is allowed, as these are generally held to be conditions precedent to recovery."

In *O'Keefe v. Corporation of St. Francis' Church*, 22 A 325, 327, the Connecticut court, in speaking of such a provision said:

"Unless waived, this provision remains a valid portion of the contract, absolutely binding upon the parties, however harsh it may appear to be. Such provisions are not inserted in contracts for naught and are not to be disregarded."

In *Abercrombie et al v. Wondiner*, 28 So. 491, 496; the Alabama Court, speaking of a like provision in a construction contract, said:

“The making of the claim in the manner stipulated, was a condition precedent to the right of plaintiffs to claim compensation, and as there is nothing in such a condition offensive to public policy, it only remains for the courts to give it force and effect. Under this clause the defendant had the right to know as the work progressed, how much the extra work would cost him, and this right existed whether the work was at his instance or voluntarily done by plaintiffs or otherwise.”

In *Burnham v. City of Milwaukee*, 75 N.W. 1014, 1020; in referring to a provision for extras in a construction contract, the Wisconsin Court said:

“The obligations and duties of contracting parties toward each other cannot be brushed aside so lightly. The terms and conditions of the contract must be substantially complied with, or some legal excuse shown for not complying with them, before an action thereon can be sustained.”

In *Capital City Brick & Pipe Co. v. City of Des Moines*, 113 N.W. 835, 840; the Court said:

“It was entirely competent for the parties in making their contract to hedge the possibility of claims for extra compensation with all such reasonable restrictions as they might devise or agree upon.”

There being no compliance with the provision of the contract requiring the submission of a claim within one week and such a provision being lawful and voluntarily entered into by the parties the item of alleged extra should have been denied by the District Court.

The Evidence Does Not Support Finding of Fact X

The item in question was set up in appellee's complaint as an extra. It is too well settled to require citation of authority that one who claims an extra has the burden of proving it. There was a direct conflict in the evidence on practically all the findings incorporated in Finding of Fact X. The court found that appellee had sustained the burden of proof relying primarily upon the testimony of Mr. Rushlight, president of appellee.

Let us examine in part Mr. Rushlight's testimony to ascertain whether it is sufficient to sustain the burden of proof.

Rushlight testified on many occasions at the trial that he had never met appellant before the bidding on this job. Tr. 116, 170, 174, 175.

Subsequently the court asked Mr. Rushlight the following question:

"The Court: You did not understand. The Court is asking you whether you were well acquainted, but before, didn't you understand very distinctly whether you had even known this man before?

A. Yes, sir. I was in error and the only thing I could do, since my memory is refreshed by these specific cases, is to say to you I was in error—* * *"
Tr. 422.

Mr. Rushlight testified he submitted a written bid to appellant for \$300,000.00. Subsequently he testified he did not know whether it was in writing. He also testified he ran off mimeographed copies of these bids but he was never able to produce a copy of this bid for \$300,000.00. Tr. 117, 161, 163, 177, 179, 180.

Mr. Rushlight testified he wrote the word "revised" on his bid of May 9th to indicate revision in price from his bid of \$300,000.00. If there was no bid of \$300,000.00, then this explanation must also fail. Tr. 167.

The record is full of similar glaring inconsistencies in the testimony of Mr. Rushlight and the trial court commented on it as follows:

"Now if the court cannot depend upon your veracity, why of course it is going to change the situation, and this is the reason I have required this further hearing, because someone, whether intentionally or otherwise, has testified to facts that are not the truth, and of course you admit now on the matter of acquaintanceship * * *" Tr. 421, 422.

We submit that the District Court was not justified in relying upon the testimony of Mr. Rushlight alone when contradicted by direct evidence to the contrary and the admitted circumstances surrounding the transaction and we further submit that this testimony produced by the appellee was not sufficient to sustain the burden of proof imposed upon it.

CONCLUSION

In conclusion, courts have at all times adopted a policy of scrutinizing claims for extras on building contracts with great care. That rule should not be relaxed as it would undoubtedly lead to endless litigation. Unless the rule is to be relaxed this court should reverse the trial court on the item appealed from on any or all of the grounds mentioned.

Respectfully submitted,

DUPUIS & FERGUSON

Attorneys for Appellants



No. 10930

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CIRCUIT COURT OF APPEALS
For the Ninth Circuit

EIVIND ANDERSON and CONTINENTAL CAS-
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Appellants,

vs.

UNITED STATES OF AMERICA for the use and benefit
of A. G. RUSHLIGHT & CO., a corporation and the
FIRST NATIONAL BANK OF PORTLAND, ORE-
GON, a National Banking Corporation, and W. L.
REID doing business as W. L. REID COMPANY,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

Charles H. Leavy, *District Judge*

Brief of Appellees

LYCETTE, DIAMOND & SYLVESTER,
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CLERK

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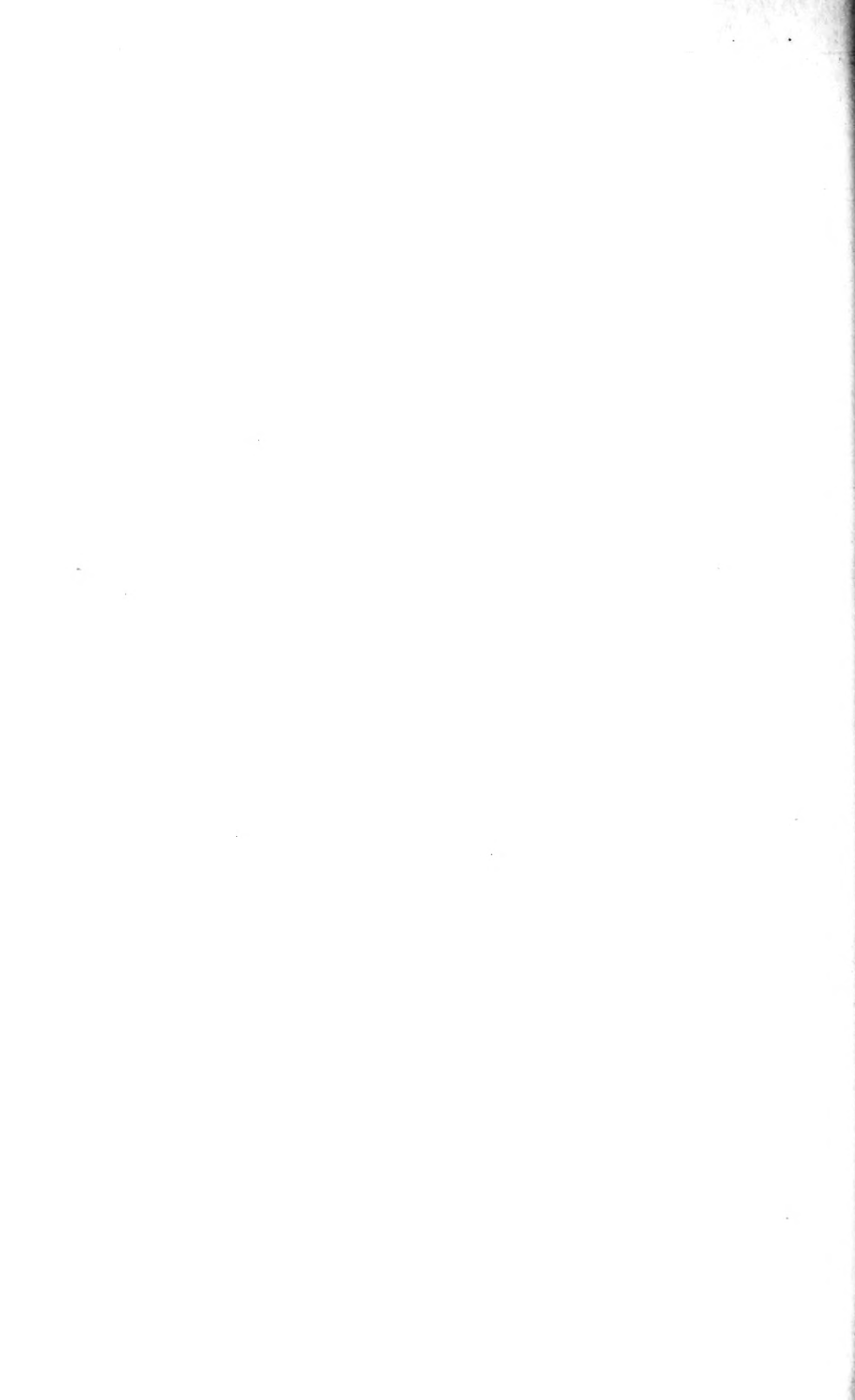
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GON, a National Banking Corporation, and W. L.
REID doing business as W. L. REID COMPANY,

Appellees.

The question involved in this case is simple, viz: Was Rushlight entitled to \$12,118.00 additional for doing the power house work according to changed plans and specifications?

The answer is, of course, found by examining the parties' contract. If the work under the changed specifications is included in the written contract, Rushlight cannot recover. The trial court held that this changed work was outside of and not contemplated by the original subcontract.

The judgment of the trial court was correct because: (1) as a straight proposition of law the changed

work was not included in the original sub-contract (2) as a matter of fact the parties did not intend to include the changed work in the original sub-contract.

In other words, on the face of the contract itself the changed work is not included; and, if you look behind the contract, then you find that the parties did not intend the work to be included.

The trial court decided that the case entirely as a question of fact, that is, decided from all of the evidence that the parties did not intend that this changed work should be included in the subcontract, but intended that it should be paid for as an extra, Trs. 28-31; 388-399.

Although the evidence was in violent conflict, and although the court made extensive and detailed Findings of Fact on the factual issues herein involved, appellant's brief completely ignores those findings, never mentions them, and bases its arguments on the thoroughly discredited and court-rejected testimony of Anderson. For this reason it is necessary for us to rather completely restate the facts. The mere re-statement of facts argues the case.

I.

STATEMENT OF CASE

The sub-contract is Exhibit 7. It describes the sub-contract work to be done by reference to specific sections and pages of the government master plans and specifications.

The government specifications, Ex. 2, are divided into specially labeled and numbered sections corresponding generally to the several trades, i.e., painting, plumbing, heating, electrical, mechanical and so forth.

The sub-contract, Ex. 7, Tr. 72, provides that Rushlight is to do the following work:

“Section 2. The Subcontractor and the Contractor agree that the materials to be furnished and work to be done by the Subcontractor are as follows:

Plumbing, heating, and mechanical installation work called for by bid form, addenda No. 1 to 5, incl., special condition and drawings, and as further covered by specifications sections:

P 1-P21 incl.

ME 1-ME 15 incl.

H 1-H 17 incl.

TH-HV 1-TH-HV 17 incl.

HA 1-HA 7 incl.”

This controversy arises out of a change in the mechanical (ME) specifications. It will be noted that the sub-contract *does not* refer to the “substituted” or “M.E. (sub)” specifications. It refers only to the original specifications.

The work was done under the "M.E. (sub)" specifications; and Anderson was paid extra by the government for doing the work under the substituted ME specifications.

The sub-contract is dated May 15. On May 21 Rushlight wrote, Exhibit 10, Tr. 93, stating that he understood that Anderson had now received formal approval covering the change in the power house, therefore, he would like to have a "*change order* from you covering the additional cost of this work and instructions to proceed" with the changed work. To this letter, Anderson replied the next day by letter, Ex. 11, Tr. 94, saying:

"You are advised that the government has approved the change in the power plant * * *. This change involves revisions in mechanical equipment, including the foundation and boilers. *You are hereby instructed* to make the necessary changes in the mechanical installations involved by the change in the government plans and specifications as may be affected by your subcontract"

It will be noted that *this letter is the change order*. Had the original subcontract covered this matter, there was no need for a "change order"; no need to say "you are hereby instructed to make the necessary changes."

Nothing speaks so eloquently as the parties' actions right at the time the work is being done. Within a couple of days after the contract was signed Rushlight asked for a "change order" and Anderson gave it to him. If the change was covered by the subcontract Anderson certainly would have said so right at that time.

This "change order" letter of Anderson's also requests Rushlight to give an immediate breakdown statement. This Rushlight promptly furnished on May 26, by Exhibit 12, Tr. 97. The last item on that breakdown (see Tr. 98) is: "Change order covering revisions in power plant as per our proposals dated April 30, 1941 —\$12,118.47."

Anderson admits that when he received this breakdown specifically setting forth the change order and price, he said nothing, Tr. 96. In fact, the first time Anderson ever denied this item was when this suit was brought. Tr. 186. As intimated by the trial court, just common honesty would require Anderson to immediately speak up at the time of this correspondence, Tr. 397.

It is advisable to go back and trace the history of the contract.

Anderson submitted his original bid on April 8, 1941, and the bids were opened the same day. Although Anderson was low bidder, the officers in charge recommended against awarding the contract to him. Tr. 263-5. This was because of Anderson's unsatisfactory reputation. Anderson, with Rushlight's attorney, then went to Washington and used political influence (proper) to get the contract. Before leaving Washington, Anderson was promised the contract. However, the contract was not formally awarded to him until May 8,

1941, when he received his "Commence Work" order (see Ex. 1). The actual contract was not signed until a later date.

However, about April 26, after Anderson had returned from Washington, and after Anderson had been orally promised the contract, the Army, by letter, Ex. 3, asked Anderson to submit a supplemental proposal omitting the original heating plant and boiler house shown on the original plan and described in the original M.E. specifications and substituting therefor, a plant as shown on new plans and "as described on pages ME 1 (sub) to ME-15 (sub) of specifications * * *"; see Ex. 3, Tr. 59.

After this Army request for a new proposal Rushlight worked out a detailed proposal covering his part of the proposed change and offering to do his part of the changed work for an additional \$12,118.47 over the job as originally planned. Under date of April 30, Anderson worked out a statement covering his part of the work in detail and included Rushlight's part for the lump sum of \$12,118.47. Rushlight's proposal was attached as an exhibit to Anderson's proposal. An original signed copy of Anderson's letters to the Government with Rushlight's letter attached is in evidence as Exhibit 4, Tr. 129-31.

A few days after Exhibit 4 was made, Anderson submitted a new proposal, Ex. 5, Tr. 64 on the changed

work. This proposal was accepted by the Army's letter date May 14, Ex. 6; but the contract between Anderson and the government was not formally changed until the issuance of the government's "Change Order A" Exhibit 26, Tr. 326, dated May 23, 1941, by which Anderson received his extra compensation for this change made under the "substituted" ME specifications.

It should be carefully noted that during this time, Anderson knew how to refer to the *substituted* or "sub" specifications because, by Exhibit 3 the Army so referred to them; and by Exhibit 5 of May 6, Anderson refers to them as "ME-1 (sub) to ME-14 (sub)." This is important because when Anderson drew the contract of May 15, Ex. 7, he did not refer to either the revised plans or the substituted specifications. In fact, Anderson testified that he was negligent in drawing the contract because it refers only to the old provisions of the original bid, Tr. 497.

It will be recalled that when it looked as though Anderson's low bid was going to be turned down, Anderson called Rushlight and it was agreed that Anderson and Mr. C. C. Hall, Rushlight's attorney, would go to Washington, Tr. 29. Before going on the trip to Washington, Anderson assured Rushlight that he would get the subcontract:

" * * * that at said time the plaintiff Rushlight desired assurance that he would be given the sub-

contract for plumbing and heating and at said Spokane meeting the defendant, Anderson, gave the plaintiff, Rushlight, assurance that Rushlight would be given the subcontract for plumbing and heating if the contract were awarded to Anderson by the government." Tr. 29, Finding of Fact X.

As soon as Anderson was sure he was going to get the main contract, Anderson "made up his mind not to give the contract to Rushlight because plaintiff Rushlight expected the award of the contract to be for \$300,000.00" (Finding of Fact X. Tr. 29). This was undoubtedly due to the fact that on May 6, Anderson received a proposal to do the work for \$286,000.00 which was \$14,000.00 less than Rushlight's figure of \$300,000.00. When Rushlight knew that Anderson was going back on his oral commitment for \$300,000.00, Rushlight decided, for moral effect, to take his attorney, Mr. Hall, to see Anderson, because Mr. Hall had been back to Washington and had greatly helped Anderson in getting the contract.

The parties, Rushlight, Hall, Anderson and his son, and a Clyde Philp met at Anderson's home on the evening of May 9. At that meeting the principal matter of discussion was price. It was finally agreed that Rushlight would do the work for \$293,000.00, thereby split-this meant "revised" price, that is, revised from \$300,000.00 and a low figure of \$286,000.00 which Anderson had just received. Tr. 29-30. When this was done, Rushlight wrote on the proposal of May 9, Ex. 8, Tr. 85, the

word "Revised." Anderson contended that this meant "Revised" plans, whereas Rushlight contended that this meant "revised" price, that is, revised from \$300,000 to \$293,000. The court found (Finding X, Tr. 30) that this word "revised" referred to the drop in price and not to the change in plans:

" * * * that the word 'revised' which was written on said letter, Exhibit Ptf No. 8, was written thereon for the purpose of indicating a revision from the controverted sum of \$300,000.00 and \$286,000.00, and that said letter and said designation 'revised' were not intended to cover a new and increased cost of construction in accordance with the government's modified program on the power plant;"

Following this proposal of May 9, Anderson, on May 10, wrote Rushlight, Exhibit 9, Tr. 91, accepting Rushlight's proposal of \$293,000.00. Anderson's letter does not mention the changed plans or substituted specifications. Then, on May 15, the formal subcontract Ex. 7, Tr. 72, was signed. This subcontract was prepared entirely by Anderson, Tr. 71, 321, who was not content with the printed form but added several pages of typed provisions. Of course, this agreement merges all prior conversations and agreements and measures the rights of the parties. As previously observed, this subcontract makes no mention of "substituted" mechanical specifications but refers only to the original specifications. In the specially prepared typewritten part of the subcontract "paragraph 1" describes and

lists the numerous main contract documents which are made part of the subcontract, but carefully omits the "ME 1 (sub) to ME 14 (sub)" specification. Tr. 78. In this connection it should be observed that the original ME specifications described in the subcontract and which are found in Exhibit 2 consists of ME-1 to ME-15, whereas the "sub" specification, Ex. 15, contains but 14 paragraphs.

Soon after the subcontract was signed on May 15, Rushlight, by Exhibit 10, Tr. 93, asked Anderson for a "change order" on the change in the power plant. In reply to this, Anderson, on May 22nd, by Exhibit 11, Tr. 94, gave Rushlight a written change order saying:

"You are *hereby* instructed to make the necessary changes in the mechanical installations involved by the change in the government plans and specifications as may be affected by your subcontract."

In the same letter, Anderson asked for a breakdown, which Rushlight furnished on May 26th, Exhibit 12, Tr. 97, showing the exact cost of the power house change as \$12,118.000. Rushlight wrote two letters on May 26th, one Ex. 12, containing the \$12,118.00 extra item and the other, Ex. 13, covering another matter. Anderson replied, by Exhibit 14, on May 28 to one of said letters but made no reference to the other or the item for \$12,118.00.

After admitting that he received the letter, Ex. 12, of May 26, containing the \$12,118 extra item, Anderson testified that he did not reply, saying:

“Q. Yes, did you acknowledge that or send any reply?” “A. I don’t think there was any occasion to send any reply. I got what I wanted, or what I attempted to get.” Tr. 96.

After reciting the above facts the Court found on this point (Finding 10) Tr. 31:

“That the written subcontract of May 15, 1941, between plaintiff and defendant was not intended to cover and did not cover the additional cost of constructing the power house plant in accordance with the Government’s modified or substituted plans and specifications; that the plaintiff is entitled to the sum of \$12,118.00 as an extra on the power plant.”

At the close of the evidence, the Court rendered a long, oral decision, Tr. 391-399, which is the basis for Finding of Fact 10, covering this \$12,118.00 item.

As heretofore indicated, it is our contention that the decision of the trial court was correct, (1) as a matter of law, (2) as a matter of fact.

II.

THE DECISION IS RIGHT AS AN ABSOLUTE MATTER OF LAW.

1. It is fundamental that all prior conversations and negotiations are merged in the final written contract.

Therefore, the true question is whether Exhibit 7, the written subcontract itself, covered this \$12,118.00 change in the power house. To decide this we must examine that subcontract and not the conversations. If the contract is clear and unambiguous it alone governs. If it is not clear, then we look to the surrounding circumstances which the trial court held clearly showed that this extra was not included in the original subcontract.

2. Since everything was merged in the writing, Ex. 7, let us examine it. Remember that Anderson alone prepared it and chose its language. The subcontract contains no reference whatsoever to the "sub" specifications or the "revised" plans under which the changed work was done. A much clearer idea of the contract will be had by examining the original instrument because of the way it is physically set up; see Exhibit 7.

The contract provides that the subcontractor will do the plumbing, heating and mechanical installation work "called for by *bid form*," "drawings," and as "covered by specifications Sections:"

"P 1-P 21 incl.
ME 1-ME 15 incl.
H 1-H 17 incl.
TH-HV 1-TH-HV 17 incl.
HA 1-HA 7 incl."

A. The *bid form* which is Exhibit 31, Tr. 354, is the original bid and is dated April 8, and, of course, was long before this \$12,118.00 change was contemplated.

Hence, the work we were to do under the subcontract is just what the subcontract says, to-wit: "the work called for by the bid form."

B. Immediately following the above description of the work the subcontract continues:

"Unit prices as established by general contractor's proposal to the Government *April 8, 1941*, shall be binding on the parties hereto." Tr. 73.

Again we see that the reference is clearly back to the original bid of April 8, not to any subsequent change.

C. *Most important of all*, is the clear contract designation of the work as work "covered by specifications Section * * * ME 1-ME 15 incl." (See Trans. 73 and original Ex. 7). No reference is made to the new plans or to the substituted ME specifications. The work was done under the substituted ME specifications, Tr. 133.

It will be recalled that on April 26, the Army wrote Anderson a letter, Ex. 3, asking for figures on the power house changes. That letter clearly states that the work shown on ME 1 to ME 15 is to be omitted and that there is to be *substituted* a heating plant, boiler house "described on pages ME 1 (*sub*) to ME 14 (*sub*)." The term "*substitute*" is used at least four times in that one letter.

In response to the Army's request, Anderson first prepared Exhibit 4, Tr. 129, showing the increased

cost and including the specific figure of \$12,118.47 for Rushlight's increased cost. Shortly thereafter, Anderson prepared and submitted to the Army, Exhibit 5, Tr. 64, a proposal dated May 6, covering this work. In that proposal, Anderson says: "—I hereby propose to construct the boiler house * * in accordance with * * ME-1 (sub) to ME-14 (sub) * * * for the sum of \$23,142.00 additional."

Both the Army and Anderson referred to this changed work in a specified manner, to-wit: "ME-1 (sub) to ME-14 (sub)." The "sub" and "ME" specifications make a document too large to print in the transcript but are before this court as Ex. 15.

Therefore, since the new and more expensive work has a clear, special designation, known and used by the parties, it will not be covered by the subcontract unless specifically mentioned. Anderson knew how to use the term "ME-1 (sub) to ME-14 (sub)" and deliberately omitted it from his written subcontract which he alone prepared. Hence that change work was not covered.

This view is made certain beyond any question when we find that just a few days later, to-wit, on May 21, Rushlight writes to Anderson, Exhibit 10, Tr. 93, stating:

"We understand that you have now received formal approval covering the change in power plant * * *

We would appreciate a change order from you covering the additional cost of this work and in-

structions to proceed with the construction of the power plant as revised.”

If the changed work had been covered by the subcontract which had just been signed a few days before, Rushlight would have written no such letter. Certainly, if Anderson thought the change was covered he would have replied by emphatically and forcibly telling Rushlight that such work was covered by the subcontract. However, Anderson replied the same day, saying, in effect: “Yes, our change has been approved; that change is so and so; and *this is your order* to make such necessary change in the work covered by your subcontract as may be affected by the change order.” We quote Anderson’s letter, Ex. 11, Tr. 94:

“In reply to your letter of May 21, you are advised that the government has approved the change in the power plant * * *. This change involves revision in the mechanical equipment * * *.

You are *hereby* instructed to make the necessary changes in the mechanical installation involved by the government plans and specifications as may be affected by your subcontract.”

As shown by that Exhibit, number 11, the changed work was not done by Rushlight under the original subcontract of May 15. It was done under that written change order of May 22nd, signed by Anderson in response to Rushlight’s request for “a change order from you.” Rushlight had asked for an order, “we would appreciate a change order from you” (Ex. 10, Tr. 93)—and Anderson came back on the following day with

Exhibit 11: "You are hereby instructed to make the necessary changes."

In the same letter ordering the changes, Anderson asked for a breakdown statement. Rushlight immediately forwarded this on May 26th, Exhibit 12, Tr. 97, and included, Tr. 98, the item of \$12,118.47. To this Anderson made no objection and no reply.

We therefore find: (1) that the subcontract by its very terms does not include the work covered by ME-1 (sub) to ME-14 (sub); (2) that the instruction to do this additional work was given by Anderson in writing by a special "change order" after the subcontract was signed.

That the subcontract does not mention this changed work is plainly shown by Anderson's own testimony in response to the court's question Tr. 494:

"The Court: Well, now is there anything in this Exhibit No. 7 which is this sub-contract agreement * * * that indicates it should include this modified heating plant? A. *No, I don't think that document there specifically calls for anything about that.*"

Further, Anderson testified that he was negligent in drawing the contract. In fact, he admitted that the way the contract was written it refers to the original bid and the original boiler, saying, Tr. 497:

"The Court: Mr. Anderson, why didn't you, when this contract was formally signed on the 15th of April, (May) so as to put this matter com-

pletely at rest concerning the modified major contract, write in there something to that effect so there would have been no room for misunderstanding? A. I think, Your Honor, there might be some sort of negligence there in the matter of writing this up, and naturally, if that contract was enforced literally as it is written there, he would have to put in three boilers of the small type under the old provision of the bid—called for bid or specification.

The Court: But your testimony in the previous hearing and on this trial was that you relied very heavily on that word written in in longhand 'revised,' and if it became a material matter on the 8th or 9th of May, a week later when the formal instrument was signed by both parties, then it would seem to the Court that it would have been so much more important that it be covered in some manner."

We submit, that as a matter of law, no evidence was admissible to vary or add to this written subcontract by attempting to add thereto the work covered by ME-1 (sub) to ME-14 (sub) which was an entirely new, different and more expensive thing than called for by the express terms of the written subcontract.

D. The very most that can be said is that some ambiguity arises when Anderson tries to make the specific terms "ME-1 to ME-15" mean "ME-1 (sub) to ME-14 (sub)."

It is an elementary rule that all uncertainties and ambiguities are to be resolved against the person who prepared the contract.

“Doubtful language in contracts should be interpreted most strongly against the party who uses it. A written agreement should, in case of doubt, be interpreted against the party who has drawn it. Sometimes the rule is stated to be that where doubt exists as to the interpretation of an instrument prepared by one party thereto, upon the faith of which the other has incurred an obligation, that interpretation will be adopted which will be favorable to the latter. It is said that an instrument uncertain as to its terms is to be most strongly construed against the party thereto who causes such uncertainty to exist.” 12 *Am. Jur.* p. 795-96, Sec. 252.

Anderson alone prepared the contract. Anderson's testimony that the subcontract does not call for anything on the modified heating plan (Tr. 494-5); and that he was negligent in writing up the contract because if the subcontract “was enforced literally” then Rushlight would have to put in the old boilers called for in the original bid (Tr. 497), indicates very clearly that the above rule should be applied and the ambiguity, if any, resolved against Anderson.

E. We have seen how both parties to the contract interpreted it at the very first time the matter came up, a few days after the contract was written. Rushlight did not consider the change in the heating plant as included and asked for a “change order” (Ex. 10, Tr. 93). Anderson immediately gave him the “change order” without even hinting that the work was covered by the original contract. (Ex. 11, Tr. 94). This

was the parties' own interpretation of the contract at the time the matter was fresh in their minds.

Interpretation by the parties is a great, if not controlling influence.

“In the determination of the meaning of an indefinite or ambiguous contract, the interpretation placed upon the contract by the parties themselves is to be considered by the court and is entitled to great, if not controlling, influence in ascertaining their understanding of its terms. In fact, the courts will generally follow such practical interpretation of a doubtful contract. It is to be assumed the parties to a contract know best what was meant by its terms and are the least likely to be mistaken as to its intention; that each party is alert to protect his own interests and to insist on his rights; and that whatever is done by the parties during the period of the performance of the contract is done under its terms as they understood and intended it should be. Parties are far less likely to have been mistaken as to the meaning of their contract during the period when they are in harmony and practical interpretation reflects that meaning than when subsequent differences have impelled them to resort to law and one of them then seeks an interpretation at variance with their practical interpretation of its provisions.” 12 *Am. Jur.* p. 787-789, Sec. 249.

In the notes to the above quotation there are many Federal cases cited. See particularly *District of Columbia vs. Gallaher*, 124 U.S. 505; 31 L. Ed. 526 at 531; *Brooklyn Life Ins. Co. vs. Dutcher*, 95 U.S. 269; 24 L. Ed. 410 at 412).

Thus we find that Anderson testified in court that the subcontract “as written,” calls for the original boil-

er and work. Anderson, at the time the work was going on, must have so understood his subcontract because when asked to give a "change order" he immediately gave it and made no suggestion that the change or substituted work was covered by the subcontract. Nothing could be clearer than that all of the parties believed and intended the original subcontract to relate only to the original work and expected the changed work to be performed under the "change order" as extra work. This is exactly the way the government handled it.

F. DATES OF GOVERNMENT CONTRACT.

The only thing that lends even a slight color of validity to Anderson's story is the dates and order of events. However, this very superficial appearance of validity disappears when you see how the government handled its contract and this item.

Anderson's claim is that the parties knew informally that the government was going to change the power house before the subcontract of May 15th was signed; that therefore the changed and substituted work must be included in the subcontract.

The original bids were on April 8th. On April 26th, by Exhibit 3, the Army asked Anderson for a quotation on the proposed substitution. On May 6th, Anderson by Exhibit 5, Tr. 54, gave a price and was orally advised that the change would be made. Tr. 266. Likewise, on May 6th, Anderson was advised by letter, that

the main contract was awarded to him. See Ex. 1. However, the main contract itself was not written up or signed by the government or Anderson for several months; that is, until August 11th. Tr. 266, 270.

There was plenty of opportunity for the government to place the substituted items in the original contract because those items were known and ordered many months before the original contract was signed. However, the Army kept the power house change as a matter entirely separate and distinct, Tr. 271-2. It gave its approval to the change on May 14, Exhibit 6, but did not actually deliver the formal document "Change Order A," Ex. 26, Tr. 326, until September 5th, although that government Change Order A is dated May 23rd, Tr. 325.

It will thus be seen that the practice on these Army jobs is to keep the changes or substitutions completely separate; to handle any substantial change such as this by a separate, formal instrument.

Thus the fact that the substitution was known before our subcontract was dated with Anderson, does not mean that the change was included in our subcontract any more than it would mean that such change was included in Anderson's main contract, simply because Anderson's contract was made up and signed by Anderson long after the change was agreed upon.

With the foregoing explanation it is easy to understand why, on May 21 (subcontract dated May 15), Rushlight asked for a formal change order; why on May 22, Anderson gave Rushlight a formal change order, and made no contention that the change was included in the subcontract; why Anderson made no objection when Rushlight, on May 26th, gave him the price of \$12,118.00 for this extra.

We submit that as a matter of law, the written subcontract did not include this item covered by "ME-1 (sub)-ME-14 (sub)" specification; that as a matter of law, this item was separately ordered by Anderson after the subcontract was made and must be paid for as an extra, just as Anderson was paid for it as an extra by the government.

III.

AS A MATTER OF FACT, THE CHANGE IN POWER HOUSE WAS NOT INCLUDED IN THE \$293,000.00 ORIGINAL SUBCONTRACT. THE PARTIES DID NOT INTEND TO INCLUDE THIS CHANGE IN THE ORIGINAL SUBCONTRACT.

The court based its decision almost entirely on questions of fact.

We have already seen that as a matter of law, this \$12,118.00 change in the power house is not included in the original subcontract. Our discussion on that

point necessarily also indicated that as a matter of fact, the parties never intended that this changed or substituted power house should be included in the \$293,000.00 subcontract figure. We now discuss this more fully from a factual standpoint.

Rushlight testified repeatedly that neither the proposal of May 9th, Ex. 8, or the subcontract of May 15, Ex. 7, was intended to include the \$12,118.00 additional cost of the change of the power plant. Tr. 173-4; 138-9. Anderson testified to the contrary.

The trial court very aptly observed that there is nothing on the face of the subcontract, Ex. 7, to suggest, or to indicate in any way that the work called for by the "ME-(sub)" specification was included in that contract. The only thing that gave him any concern was that the proposal of May 9, Ex. 8, is marked "revised," Tr. 396. The contract itself bears no such notation either on it or by its contents.

The Court found that the word "revised" referred to a *revised price*, and not to revised plans or work. With this finding it necessarily followed that the \$12,118.00 power plant item is extra work, not included in the subcontract.

Finding of Fact No. 10, Tr. 28-31, is a complete story of the highlights of this case. It is controlling and should be read. The same Findings of Facts are set forth in the Court's oral opinion, Tr. 388-99.

There was a violent conflict in the testimony. The trial court found with Rushlight and found that Anderson testified falsely on nearly all major points. In fact the trial court said:

“Now from that point on we come to the evidence here that—evidence in sharp conflict. If the Court finds the facts to be as the plaintiff Mr. Rushlight testifies they were, then, of course, Mr. Anderson has made mis-statements that are impossible of belief and would shake the Court’s credibility in this testimony.” Tr. 391.

After making the above statement, the Court found with Rushlight and against Anderson. We will later point out some fifteen or more specific and vital points upon which Anderson testified falsely. However, before doing this we should briefly sketch the background of the case so that the Court’s irresistible findings as to the *intention* of the party will become clear.

On April 8 the bids were opened. Anderson was low. The contract was not awarded to him immediately as was customary. The same day Rushlight learned that Anderson was not going to get the contract and so advised Anderson; but Anderson only scoffed. Tr. 119. Rushlight was anxious for Anderson to get the contract so that he could get the subcontract for plumbing and heating. Rushlight then told Anderson that if Anderson found what Rushlight said was authentic, then he, Rushlight, would be glad to help. T. 119. Several days later Anderson called Rushlight and told him that he

had learned that they were going to give the contract to the second bidder. Tr. 120. It was then agreed that Rushlight and Anderson should meet in Spokane in a few days and that Rushlight would bring his Portland attorney, Mr. C. C. Hall; that Hall would go back to Washington to help Anderson get the contract. The three parties met in Spokane. Before Hall would go back to Washington, Rushlight and Hall wanted assurance that if the contract were obtained for Anderson that the subcontract at \$300,000.00 would be given to Rushlight. Thereupon, Anderson and Hall went to Washington by plane and spent several weeks together. They occupied the same room, first in a private home, and later at the hotel. Anderson paid the hotel bills and all expenses and gave Hall \$100.00 expense money. Through the use of political influence (proper), the contract was promised to them and they left. Tr. 195-8.

Shortly after Anderson arrived home, and before the contract was actually awarded to Anderson, the Army decided to make some changes in the power house called for by the April 8th bid. It issued some new plans and new or substituted ME specifications, Ex. 15, and on April 26, by Exhibit 3, asked for figures. Anderson and Rushlight prepared a bid, Ex. 4 on this change.

This signed bid by Anderson specifically includes Rushlight's part of the changed work at a figure of \$12,118.00. Later, on May 6th, Anderson submitted a

slightly different figure on these changes or extras, and it was accepted.

The same day, May 6, Anderson was given a letter (in Ex. 1) advising him that the main contract was awarded to him. Also, on the same day, Anderson received an offer from one Hastorf, Ex. A-28, Tr. 275, to do the plumbing and heating work under the original contract (not including the power house change) for \$286,000. Having secured his contract from the government with Rushlight's help Anderson now decided to renege on his agreement with Rushlight, because Rushlight expected \$300,000.00 and Anderson could now get the work done for \$286,000.00. Thereupon, Rushlight took Mr. Hall to see Anderson because Hall had gone to Washington to help get the contract. Rushlight and Hall met with Anderson and his son at Anderson's home on the evening of May 9. Clyde Philp (Anderson's bondsman and called as a witness by Anderson) was also present. The chief discussion was about the contract price. As a result of the meeting, Exhibit 8, Tr. 85, was signed, fixing the price at \$293,000.00, which was just half way between Rushlight's original figure of \$300,000.00 and the \$286,000.00 price which Anderson had from Hastorf on May 6th.

All witnesses agreed that the subject of revised or substituted plans or work on the boiler house was not even mentioned that evening. Anderson testified, Tr. 318:

“Q. Well now, you never discussed that that evening at all. You never even mentioned the boiler situation that evening?

A. No, because we had discussed it so thoroughly before, there was really no occasion to go over and discuss it again. That was covered.

“Q. All right, there was no discussion of the boiler situation—revised boilers—at all on May 9th?

A. Not that I recall * * *

The proposal, Ex. 8, was originally dated April 3, 1941, by typewriter. This was changed in longhand on May 9, 1941, and the word “revised” was written in by Rushlight.

Anderson and his son testified that the change to “May 9,” and the writing of the word Revised, were simply to bring the proposal up to date. (See Tr. 221; 317). In fact, Anderson testified: “Personally I don’t think we saw any great significance in that word ‘Revised.’ ” Tr. 498.

Rushlight testified that the word “Revised” was used to indicate a change or revision from his original \$300,000.00 price to \$293,000.00. Tr. 138, 167, 385. Clyde Philp, though called as a witness by Anderson, testified that the \$293,000.00 did not include the change in the boiler house but related only to the original bid, saying:

“A. It was my understanding from both their understandings that the boiler house change was—figures was not included in this two ninety three.” Tr. 457.

“A. Well, it was my understanding that that price of two ninety three did not include any boiler house.” Tr. 469.

In addition to the above testimony, we have the facts: That both the proposal, Exhibit 8, and the subcontract, Ex. 7, describe only the original work, and neither, in any way, mention the new ME (sub) specification; that within a few days, May 21, Ex. 10, Rushlight asked for a “change order” and on May 22, by Ex. 11, Anderson gives the change order on this item; that on May 26, Rushlight gives the breakdown showing the cost of the changed work at \$12,118.00; that Anderson never objected to that item until this suit was started; that the government itself carried the item separately throughout and issued its change order, Ex. 26, as of May 23rd, which was subsequent to the date of the subcontract.

From the foregoing, the Court could hardly help but find as it did:

“ * * * that the word “Revised” which was written on said letter, Exhibit Ptf. No. 8, was written thereon for the purpose of indicating a revision from the controverted sum of \$300,000.00 and \$286,000.00, and that said letter and said designation ‘revised’ were not intended to cover a new and increased cost of construction in accordance with the Government’s Modified Program on the Power Plant;”

“That the written subcontract of May 15, 1941, between plaintiff and defendant was not intended to cover and did not cover the additional cost of constructing the power house plant in accord-

ance with the Government's modified or substituted plans and specifications; that the plaintiff is entitled to the sum of \$12,118.00 as an extra on the Power Plant." Tr. 30, 31.

(See also Tr. 28, Finding of Fact No. 10; also Opinion, Tr. 387-400).

IV.

FALSE TESTIMONY OF ANDERSON

We have never seen a more brazen perjurer than defendant Anderson. We point out only a few of the more obvious mis-statements.

1. To begin with, it should be remembered that Anderson's reputation was such that the local (Tacoma) and San Francisco Army officers would not award the contract to him even though he was low bidder.

2. The court started his opinion:

"If the Court finds the facts to be as the plaintiff Mr. Rushlight testifies they were, then, of course, Mr. Anderson has made mis-statements that are impossible of belief, and would shake the Court's credibility in his testimony." Tr. 391.

The Court then adopted Rushlight's testimony and found for him and against Anderson.

3. Anderson testified repeatedly that he never had a bid or discussed price with Rushlight prior to May 6. Tr. 251, 283, 313.

The Court found that Rushlight had given Anderson a price even before the bids were open on April 8. Finding 10, Tr. 28-29; Opinion, Tr. 392.

4. Anderson testified repeatedly that he was not having any trouble in getting his bid accepted by the government. Tr. 231, 288. That he did not know that his bid was going to be rejected. Tr. 51.

The Court held this untrue, saying:

“I can not find with Mr. Anderson’s testimony and upon his contention that he still believed after these bids were opened for some time thereafter that he was going to get this contract. I must find that he knew very shortly after the opening of the bids that his bid would be rejected * * * ” Tr. 393. See also Tr. 29.

5. Anderson tried to make it appear that Rushlight called him about going to Washington, instead of admitting that he called Rushlight for help. Tr. 231, 287.

The Court held Anderson’s testimony false. Tr. 393, 29

“ * * * I therefore find, based upon the testimony of the plaintiff Rushlight, that it was the defendant Anderson who called him some three or four days subsequent to the opening of the bids and suggested that some steps be taken to insure the securing of this contract * * * ” Tr. 393.

6. Anderson repeatedly told a fantastic story that the meeting of Anderson, Rushlight and Attorney Hall in Spokane (which resulted in the trip to Washington) was a mere coincidence, an accident, instead of a pre-arranged affair. Tr. 52-4, 231-35, 287-293.

This whole story the Court held to be absolutely false. Tr. 393, Tr. 29.

“ * * * and that the meeting in Spokane was not an accidental or incidental meeting, but one which resulted in a prearranged plan.” Tr. 393.

“ * * * that an arrangement was made between the plaintiff Rushlight, the defendant Anderson, and Mr. C. C. Hall, attorney of Portland, Oregon, for a meeting at Spokane, and at said Spokane meeting further arrangements were made for the defendant Anderson and Mr. Hall to go to Washington, D. C., for the single purpose of securing said contract;” Tr. 29.

It is hard to realize that anyone would deliberately fabricate such a complete story about this Spokane meeting and the subsequent trip to Washington, D. C. Just to read the testimony of Anderson, Tr. 52-4, 231-35, 287-293, in the face of the other facts shows his dishonesty. Of course, the Court based his opinion on the testimony of others as well as the inherent improbabilities of Anderson's story.

7. Anderson testified repeatedly that Hall and Rushlight were going to Washington on some business of their own instead of on his contract and hence that the meeting was accidental. Tr. 52; 232-3-4; 293.

Mr. Hall testified that his sole and only purpose of going to Washington was on Anderson's contract, Tr. 199, and the Court so found, Tr. 29; 394.

8. Anderson repeatedly testified that he never at any time, prior to May 6 promised the subcontract to Rushlight. Tr. 233; 283; 251.

The Court held this false and found that shortly after April 8, Anderson promised the contract to Rushlight:

“* * * That at said time the plaintiff Rushlight desired assurance that he would be given the subcontract for plumbing and heating and at said Spokane meeting the defendant Anderson gave the plaintiff Rushlight assurance that Rushlight would be given the subcontract for plumbing and heating if the contract were awarded to Anderson by the government.” Tr. 29; 393.

(See Mr. Hall's testimony Tr. 195-6.)

9 Anderson repeatedly testified that he told Hall and Rushlight that he did not need or want any political help. Tr. 293; 233; 348.

While this statement, from a man going to Washington to use political influence to get a big contract is absurd, nevertheless the Court found that it was false; that Anderson specifically arranged for this help. Tr. 393-4.

10. Anderson repeatedly testified that he did not know that Mr. Hall was a lawyer but thought that Hall was engaged in the plumbing business. Tr. 52; 89; 282-3.

No man can travel to Washington on the plane with Mr. Hall; sleep in the same room with him, Tr. 197; pay his hotel bill, Tr. 198; advance traveling expenses, Tr. 198; appear before the various departments in Washington, and generally be with him for

nearly two weeks, Tr. 196, without knowing that his sole business was that of an attorney.

11. Anderson first testified that he did not pay Hall's expenses, Tr. 53, but later admitted that he did pay them and gave a fantastic excuse. Tr. 235.

12. On the most vital point of all—what took place on May 9, when Rushlight's proposal, Ex. 8, was submitted—Anderson gave deliberate false testimony. Anderson and his son testified repeatedly that on that occasion there was no discussion of price whatsoever. Tr. 255; 317; 495; 222-3.

The Court found that in that four hour meeting "the adjustment of the subcontract price was the primary and major subject of discussion." Tr. 30; 395.

13. Anderson testified that he suggested the \$293,000.00 figure, without any relation to any other factor, and that it was agreed upon on May 6. Tr. 251-3; 314-16.

The Court found that this figure was agreed upon on May 9 and was a compromise between Rushlight's original figure of \$300,000.00 and a recent low bid of \$286,000.00. Tr. 31; 396.

14. Anderson at first denied that he had ever seen or received the very important "ME (sub)" specifications, Ex. 15, Tr. 57; 102-9; then admitted receiving them, Tr. 239.

15. Anderson even denied his own signature on the document, Ex. 4, which showed the price of the extra work there involved, Tr. 61-2. Later he admitted it. Tr. 278.

16. Anderson first admitted that he made no reply to Rushlight's letter, Ex. 12, setting out the extra cost of this change order. Tr. 96; but later changed his story and gave it an unbelievable explanation, Tr. 505-6.

The foregoing are but a few of the many deliberate false statements made by Anderson. We have passed over innumerable minor falsehoods which Anderson used as the background to bolster up the false impression he was trying to create.

SUMMARY

Even Anderson testified that, if taken literally, the subcontract refers to the old specifications and does not include the new work. Tr. 497. Hence, the very best that Anderson can do is to look to outside testimony to establish the *intent* of the parties. However, on sharply controverted testimony, the trial court finds all of the facts against Anderson; finds that the parties did not intend to include this \$12,118.00 item in the original subcontract.

FINDINGS OF FACT ON CONTROVERTED
EVIDENCE ARE CONCLUSIVE

Larsen v. Portland-California S.S. Co., 66 Fed.
(2d) 326;

Metro-Goldwyn-Mayer v. Sear, 104 Fed. (2d)
892;

Adair v. Shallenberger, 119 Fed. (2d) 1017;

British-American Assur. Co. v. Bowen, 134 Fed.
(2d) 256.

V.

ANSWER TO APPELLANT'S POINT 1

A. Pages 11 to 23 of Anderson's brief are devoted to arguing that the change in power house work is not an extra. Anderson's argument is all based on the proposition that since the fact that the substituted work was to be done, was known before the subcontract was actually written, that therefore the substituted work must be included.

The argument heretofore made in this brief clearly shows that notwithstanding the fact the changed work was known before the subcontract was signed, nevertheless: (1) That the substituted or revised work was not mentioned in the proposal of May 9, Ex. 8; (2) Was not mentioned in the actual subcontract itself, Ex. 7; (3) Was not actually formally ordered by the government until "Change Order A" Ex. 26, dated May 23; (4) That this change order revision was treated as a separate, independent item, and "extra" throughout,

by both the government and these parties; (5) That Rushlight asked for a formal "change order," Ex. 10, on this very item and was given a formal written "change order" by Anderson, Ex. 11.

In addition to the foregoing, Anderson's brief, page 8, admits that in "the subcontract as written," "no specific reference is made to the revision in type of boilers;" and at the trial Anderson admitted that he was negligent in preparing the subcontract, because the subcontract actually referred to the original specifications and not the substituted specification. Tr. 497.

Therefore, the best that can be said is that there was an ambiguity. The court then heard all the evidence on *intent* of the parties and found that the parties did not intend to include this item in the subcontract.

B. In Anderson's brief, pages 11-23, as well as in his statement of the case—there is a vague suggestion that because part of the changed work was sublet to Roy Early Co., and the cost charged against Rushlight's contract that this, in some mysterious manner, prevented the work from becoming an extra.

If Anderson's brief means that the ordering of the boilers on May 6, is some evidence from which to argue that the changed power house was included in the subcontract, then we must agree that it is argumentative,

but the apparent force of such argument is overwhelmingly destroyed by the other evidence in the case.

The purchase of the boilers is easily understood. Rushlight thought he had an agreement with Anderson; the boilers were in great demand and hard to get and had to be snapped up quickly; they could be resold any time; Rushlight thought he was safe in purchasing them. Tr. 216, 217. Rushlight had been dealing with Early when he was making up his part of Ex. 4, which, Tr. 131, shows a difference of \$12,118.00 between the original and substituted power house. Rushlight's breakdown is attached to Anderson's own letter, Ex. 4, as an extra to be paid by the government.

Clearly, as shown by Exhibit 4, this item was treated as an extra on April 30 by both Rushlight and Anderson. There is not one single word of testimony by Anderson or anyone else that this item had changed its status between April 30 (when Ex. 4 was made up) and May 6 when the order was given to Early. Consequently when Rushlight and Anderson ordered the boilers from Early on May 6 and 7 (Ex. 17) they still were ordered as extras—an extra for which the government itself did not issue a formal change order until May 23, Ex. 26.

If Anderson's brief actually means that the changed power house was not furnished at all by Rushlight, then such a suggestion is plainly dishonest. Such a

suggestion is being first made by Anderson's brief in this court. Anderson was represented by different counsel in the lower court but we doubt that even a change of counsel justifies so unfair a change in the theory of the case.

Of course, even Anderson's brief, Page 6, admits that the only reason Anderson, instead of Rushlight, signed the contract with Early was so that Early could avoid selling to an Oregon firm which was outside his sales territory, Tr. 211. Rushlight instructed Early to handle it this way, and the purchase was charged back to Rushlight's account, Ex. 17.

A comparison of Early's contract, Tr. 212-14, with the Rushlight breakdown, Tr. 131, will show that there were many big items which Early did not furnish, for example, soot blowers, stoker, breeching, pump, tools, cleaners, expanders, front plates and so forth.

Probably the most convincing answer to this malodorous new suggestion is that Anderson, himself, considered that Rushlight was doing this work and furnishing the material because otherwise, there is no possible way to explain Exhibits 10 and 11 where Rushlight asked for a "change order" to cover this additional work and where Anderson says: "you are hereby instructed" to do this work.

It seems most inconsistent that Anderson would spend days testifying, and his brief using many pages

arguing that these changes are included in the \$293,000.00 subcontract, and at the same time suggest that these extra changes had nothing to do with Rushlight because perchance they were ordered in Anderson's name but charged to Rushlight.

No doubt we have misunderstood Anderson's brief because the heading of his first argument is: "The boiler revision was part of appellee's subcontract and not an extra."

C. DECISIONS CITED

We have carefully read the cases cited by appellee's brief, Ps. 19-23. They have so little to do with the issues in this case as to require no comment whatsoever.

V.

ANSWER TO APPELLANT'S POINT 2

Claims for extras must be made within one week.

The argument made by Anderson under this heading seems to be ridiculous and without foundation whatsoever.

The provision relied upon by appellant is very general and is simply that claims must be made in writing within one week from the date incurred.

1. It may be admitted, for the sake of argument that such provisions, though greatly disliked by the courts, will be enforced if the court can find no way,

by waiver or otherwise, to avoid them. See complete annotation, 66 A.L.R. 649.

2. However, in this case, the extra was ordered in writing by Anderson. The subcontract was signed on May 15—and on May 21, by Exhibit 10, Rushlight asked for a written “change order,” and on May 22, by Ex. 11, Anderson gave Rushlight a written order to make this change.

Thus, the order was in writing—and within one week from the date of the contract. It was good under any possible contention.

3. In one place, appellant’s brief (P. 24), suggests that the week started to run on May 6—prior to the time the contract was signed. This contention, of course, is absurd; but if it had any validity then the evidence showed that the exact claim, in the exact amount, was set up by Rushlight’s Exhibit 4, Tr. 129, on April 30th, and approved in writing by Anderson the same day by Exhibit 4.

4. There is no showing when the work was actually done to fix the running of the “one week” provisions—but we do know that the written claim and order were within one week from the date the contract was signed.

5. These provisions are for the protection of the owner—and in this case, the owner was at all times fully advised in writing on this point and himself gave the extra order.

6. The written order from Anderson, Ex. 11, of May 22, is prior to the government's order to Anderson, Ex. 26 of May 23.

VI.

ANSWER TO APPELLANT'S POINT 3

Evidence does not support Finding No. X (Appellant's brief 27-28).

Finding X governs this entire appeal. Appellant has dismissed that entire finding by saying that since Rushlight was mistaken on an inconsequential point that Finding X is therefore without sufficient proof.

The quotation given by appellant at page 28 is very unfair and misleading. While it is true that Rushlight testified that he did not know Anderson prior to this deal—and that when his memory was refreshed he remembered meeting Anderson on prior occasions—nevertheless this was of no moment. Rushlight had no business dealings or social contacts with Anderson, Tr. 284-5; 442. The Court was of the opinion and found that Rushlight's mistake was unintentional, Tr. 514, and based the finding on the fact that Anderson himself testified, Tr. 480: "I was sure that Mr. Rushlight's face was familiar with me prior to April 8." See also Tr. 284.

The Court not only believed Rushlight and Mr. Hall on sharply conflicting evidence but had the benefit of all surrounding facts and written documents.

Against this was the fantastic and utterly unbelievable testimony of Anderson.

CONCLUSION

In conclusion we respectfully submit: That the subcontract, on its face, and as a matter of law, did not include this extra work; that the extra work was separately ordered in writing by Anderson after the subcontract was made; that the evidence overwhelmingly supports the Court's findings that it was not the intention of the parties to include this extra work in the subcontract.

The judgment should be affirmed.

Respectfully submitted,

LYCETTE, DIAMOND & SYLVESTER,

Attorneys for Appellees.

No. 10930

IN THE
United States Circuit Court
of Appeals
FOR THE NINTH CIRCUIT

EIVIND ANDERSON and CONTINENTAL
CASUALTY COMPANY, a corporation,
Appellants,

VS.

UNITED STATES OF AMERICA for the
use and benefit of A. G. RUSHLIGHT
& Co., a corporation, and the FIRST
NATIONAL BANK OF PORTLAND, ORE-
GON, a National Banking Corporation,
and W. L. REID, doing business as
W. L. REID COMPANY,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE
WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

CHARLES H. LEAVY, *District Judge*

Reply Brief of Appellants

DUPUIS & FERGUSON,

Attorneys for Appellants.

816 Northern Life Tower,
Seattle 1, Washington.

FILED

JUN 1 1945

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No. 10930

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GON, a National Banking Corporation,
and W. L. REID, doing business as
W. L. REID COMPANY,
Appellees.

In view of the disparity between certain state-
ments and conclusions, made by appellees in their
brief, and the record, we have numbered this brief
in the same order as appellees' brief in the hope
that this procedure would facilitate the work of
the court.

I.

The appellees in their brief set out a counter
statement of the case and cite as authority for the
counter statement certain portions of the District
Court's Findings, contradicted testimony of in-

terested witnesses, and in some instances no supporting testimony of any kind. So that this court will have the benefit of our analysis of this counter statement, we will discuss several material statements made by the appellees to show that there is no foundation to the counter statement. It is also important to note that Finding of Fact X, relied upon by appellees in support of their counter statement is assigned as error and should not be regarded as conclusive, insofar as this appeal is concerned.

On page 4 of their brief, appellees state that Ex. 11, Tr. 94 is a change order. The preceding letter of appellee, Ex. 10, Tr. 93, reads in part as follows:

“. . . we would appreciate a *change order from you covering additional costs of this work* and instructions to proceed with the construction of the Power Plant as revised.”

The exhibit in question (Ex. 11, Tr. 94) reads as follows:

“Rushlight, A. G.

May 22, 1941

A. G. Rushlight & Co.
407 S. E. Morrison Street
Portland, Oregon

Gentlemen:

“In reply to your letter of May 21, you

are advised that the Government has approved the change in the Power Plant of the 400-Bed Hospital Project at Fort Lewis in accordance with my proposal submitted May 2, 1941. This change involves revision in mechanical equipment, including the foundation and boilers.

"You are hereby instructed to make the necessary changes in the mechanical installation involved by the change in the Government plans and specifications as may be affected by your subcontract.

"In accordance with our previous understanding, you are to furnish a breakdown statement showing the different items on the Plumbing, Steam Heat, and Hot Air Heat installation. Will you please forward this information immediately in order to permit me to furnish certain information required under my contract with the Government, giving also a separate breakdown on steam distribution. Your prompt attention to this matter is essential.

Very truly yours,

EIVIND ANDERSON.

EA/b

(Endorsed) : Filed Apr. 6, 1944."

It is to be noted that there is nothing in Ex. 11 *covering additional costs of this work* as requested by appellee, and the president of appellee admitted that he never construed it as a change order, agreeing to pay for any extra work. Appellee's president testified, Tr. 157, as follows:

“Q. And at that time you were asking him for—to, in July, you were asking him to accept the price on the revisions?”

“A. Yes, we were asking him to give us a written order for them.

“Q. And he never did so, did he?”

“A. He ignored it. He never declined or *never agreed to*. He just simply ignored them.”

The most that can be said for Ex. 11, is that it is an instruction to proceed. In view of the magnitude of the job and the very short time allowed for the performance, it is in no wise inconsistent with the present position of appellant that he should give an order to proceed with work that the appellee was obligated to perform.

With regard to the last paragraph of Ex. 11, requesting a breakdown of the contract price, that had nothing to do with an extra, but was required by the express terms of the subcontract. Ex. 7, Tr. 80 reads as follows:

“Paragraph 5. The sub-contractor will furnish the contractor within five (5) days from the date of this agreement, a breakdown of the sub-contractor’s contract price to establish basis of payment.”

The inclusion of the item in question in the breakdown of the contract price negatives the present claim that it was intended to be an extra.

Appellees, on page 6 of their brief, place considerable stress on Ex. 4. Ex. 4 was never in fact used or submitted to the army. Tr. 249.

It is stated on page 7 of appellees' brief that appellant should have used the words "substituted" or "sub" specifications in the sub-contract. An examination of the documentary evidence passing between the parties at the time, clearly shows that neither appellant nor appellee used the words "substituted" or "sub" specification but continually referred to the boiler change as "revised" or "revision."

Ex. 4 (1st sheet), Tr. 129, prepared by appellant, uses the word "revisions."

Ex. 4 (2nd sheet), Tr. 130, prepared by appellee, uses words "revisions" and "revised."

Ex. 12, Tr. 98, prepared by appellee, uses word "revisions."

Ex. 10, Tr. 93, prepared by appellee, uses word "revised" twice.

Ex. 11, Tr. 94, prepared by appellant, uses word "revision."

Throughout this interchange of communications both appellant and appellee referred to the boiler change as "revised" or "revision" and never as "substitute" or "sub" specifications.

In spite of that usage of the word "revised" appellees state on page 9 of their brief that the word "revised," which was written on appellees' bid, Tr. 85, by its president, meant a drop in price and not a change in plans. This is inconceivable in view of the common usage of the word, by the parties, to denote the change in the type of boilers. However it must fail for an additional reason, which is that there never was a bid made by appellee for \$300,000.00, hence there couldn't be a revised bid price.

Rushlight testified, Tr. 116:

"Q. I will ask you whether or not you made a proposal to him in connection with the plumbing and heating on that job, prior to the time that he bid—he gave his bid to the government?

"A. Yes, I made him a definite proposal on the plumbing and heating prior to the time he made his bid to the government on this four hundred-bed hospital job."

and in Tr. 161:

"Q. Do you claim you submitted a written bid to Mr. Anderson of it prior to that time?

"A. Yes, he had a copy of this same proposal here as of April 3, 1941, calling for the three hundred thousand dollar price."

and in Tr. 162:

“Q. You want it understood you submitted this bid to Mr. Anderson prior to the opening of the bids?

“A. Yes.”

In answer to a question by the court, Rushlight testified about the alleged bid of \$300,000.00 as follows, Tr. 180:

“The Court: Do you have a copy of it?

“A. No, we don't keep copies of these because they are not in contract form. They are just proposals. We have a master copy of—those are made off of, but we couldn't keep copies of each individual one.”

The above testimony of Rushlight was categorically denied by appellant. In addition to this, Clyde Philp, who drove appellant and Rushlight to the bid opening, testified as follows, Tr. 449, 450:

“Q. Now then you recall of driving them to Fort Lewis with Mr. Rushlight and Mr. Anderson?

“A. Mr. Anderson and Mr. Rushlight drove to Fort Lewis with me.

“Q. And they drove in your car?

“A. That is right.

“Q. And I will ask you whether you recall whether Mr. Rushlight asked Mr. Anderson what his bid was?

“A. Mr. Rushlight was asking Mr. Anderson what the low plumbing figure was that he had used.

“Q. Yes, and what did Mr. Anderson tell him?

“A. Well, Mr. Anderson—there was a little kidding going on there and Mr. Anderson told him that—“why didn’t you prepare a figure for me?” or words to that effect.

“Q. Anderson asked him why he did not prepare a figure?

“A. Yes, sir.

“Q. And what did Mr. Rushlight say?

“A. And Mr. Rushlight said he didn’t get out a close bid on this one, but if he got the job he would talk to him afterwards.

“Q. He said that he did not get out a close bid on it but if Anderson got the bid Rushlight would talk to him afterwards?

“A. That is right.”

It is clear from the testimony that there was no prior bid of \$300,000.00 made by Rushlight and his story that he did not keep copies of bids involving such a sum as \$300,000.00 is little short of fantastic. It is also important to note that the bid price for plumbing and heating contained in the breakdown of the original bid of appellant was not \$300,000.00 but \$286,000.00. Ex. 28.

It is clear that the counter statement of the case is not a correct summation of the evidence in the case but is a theory advanced by appellees contrary to the greater weight of the evidence.

II.

The appellees take the position that the decision is right as a matter of law. They cite the rule that, "it is fundamental that all prior conversations and negotiations are merged in the final written contract," in support of their position. While we have no quarrel with that rule, the appellees did not rely on that rule in the District Court, but on the contrary introduced all types of extraneous and irrelevant matter and an examination of their statement of the case indicates they are still relying on the same evidence in this appeal.

Appellees take the position that because Exhibit 7 did not use the word "sub" specification, it did not include the revised boilers. The materials to be furnished and work to be done as defined by Exhibit 7, was the plumbing, heating and mechanical installation. Tr. 72. It specifically refers, among others, to M. E.-1, which reads as follows:

"M. E.-1, *Scope of work*: This section of the specification includes the furnishing of all labor, materials, *equipment*, etc., that are necessary for the complete installation of *all mechanical equipment* required in connection with the *Boiler*

House and Distribution System. The system shall be delivered complete, in perfect working order in full accordance with the intent and meaning of the plans and specifications and to the complete satisfaction of the C. Q. M." Exhibit 2, M. E.-1.

It is clear that the subcontract contemplated that appellee would furnish and install boilers described in the plans and satisfactory to the Construction Quartermaster. As we pointed out in our opening brief, the appellee knew prior to making the subcontract and also prior to submitting his proposal marked "revised" that revised plans had been made and submitted to appellee, showing that the type of boilers had been changed and that these were the only ones which would be satisfactory to the Construction Quartermaster.

The appellees take the position that since the specifications for the revision M. E.-1 (sub) to M. E.-14 (sub) were not specifically mentioned in the contract that the revised boilers did not have to be furnished.

It is obvious from an examination of the subcontract that the appellee was obligated to install a set of boilers. The only question is which set of boilers was it required to install?

If Exhibit 7 were the only contract between the parties, the court might arrive at the conclusion that the original boilers were to be installed.

However, at the time Exhibit 7 was made, there was already a binding contract between the parties to install the revised boilers and deduct the cost of them from the appellees' contract price. Exhibit 17. The appellee does not take the position that Exhibit 7 superseded, modified or rescinded Exhibit 17. Therefore it must be in full force and effect and appellee must have known when he entered into the subcontract for \$293,000.00 that appellant was entitled to deduct the cost of installation of the revised boilers, as the same officer had executed Exhibit 17 only a few days prior to the execution of Exhibit 7.

Thus when the two contracts are construed together the only conclusion that can be reached is that the appellee was required to install the revised boilers or more correctly stated was to have the cost of the installation deducted from his contract price, which had not as yet been reduced to writing.

Exhibit 4, upon which appellees place so much reliance, had been prior in time to both Exhibit 7 and Exhibit 17 and would, under appellees' own rule of law be merged in those agreements.

The letter from Rushlight, Ex. 10, upon which appellees rely, and the answer, Exhibit 11, would not alter the contract between the parties and were, as a matter of fact, only a part of a premeditated

plan to construct a basis for this present action.

While it would have undoubtedly prevented this action for appellant to have included the matter of the boiler revision in the sub-contract, he was no doubt justified in believing that Exhibit 17, plus the word "Revised" on appellees' bid, Exhibit 8, were sufficient.

It is a general rule of law that where more than one instrument is written between the same parties concerning the same subject matter they should be considered together even if not executed on the same day. In the case at bar there were nine days between the execution of Exhibit 17 and Exhibit 7.

"The general rule is that in the absence of anything to indicate a contrary intention, instruments executed at the same time, by the same parties for the same purpose, and in the course of the same transaction will be read and interpreted together, it being said that they are, in the eyes of the law, one instrument. Moreover, when two instruments are entered into between the same parties concerning the same subject matter, whether made simultaneously or on different days, they may, under some circumstances, be regarded as one contract and interpreted together. A transaction constituting a contract must be considered as a whole, even though it consumed more than one day, the date of the writings constituting such transaction being immaterial." 12 Am. Jur., p. 782, Sec. 246.

It is the appellees' contention that the parties

contracted to install the old rather than the revised boilers. Such a contention is not sound or reasonable in view of the fact that all of the parties knew of the change prior to the date of the sub-contract.

It is a fundamental rule that contracts must be given a fair and reasonable interpretation.

“In the transactions of business life, sanity of end and aim is at least a presumption, though a rebuttable one. A reasonable interpretation will be preferred to the one which is unreasonable. When the evidence of the agreement furnished by the contract itself is not plain and unmistakable, but is open to more than one interpretation, the reasonableness of one meaning as compared with the other and the probability that men in the circumstances of the parties would enter into one agreement or the other are competent for consideration on the question as to what the agreement was which was written establishes.” 12 Am. Jur. p. 792, Sec. 250.

The appellees next contend that the most that can be said is that the contract was ambiguous. We submit that when exhibit 7 is construed with exhibit 17, there is no ambiguity.

Nor is the rule on interpretation by the parties any more favorable to appellees than to appellant. The appellant at all times before and after the work in question was performed, refused to agree to pay any extra for it. This is admitted by W. A.

Rushlight, the president and chief witness for appellees. Tr. 157.

“Q. And at that time you were asking him for—to, in July, you were asking him to accept the price on the revisions?”

“A. Yes, we were asking him to give us a written order for them.

“Q. And he never did so, did he?”

“A. He ignored it. He never declined or never agreed to. He just simply ignored them.”

The appellee, however, construed its contract to require the installation of the revised boilers and they were in fact installed. The actions of the parties speak louder than their words, particularly where, as here, the words of appellee were spoken with the thought in mind of laying the groundwork for a claim for extras. We submit that the interpretation of the parties favor the position of appellant and not the position of appellee.

The appellees infer that since the government treated the boiler revisions separately that their contract should be treated in the same way. The evidence is uncontradicted that the contract and the revision were made the same day, May 6, and both prior to the execution of either Ex. 7 or 17. The only reason the government treated the revision separately was a matter of accounting pro-

cedure. There is no showing here of an intent by the parties to treat these matters separately or that for some reason of accounting practice they determined to do so. In the absence of such a showing, the burden of proof being on the appellees, it must be assumed there was no such intent.

III.

The appellees are correct when they state, "the court based its decision almost entirely on questions of fact." As a matter of fact, the District Court in its decision ignored many of the fundamental rules of law which, had they been properly applied, the appellants here would not have been required to seek relief in this court.

Some of these facts upon which the District Court relied are set out in appellees' brief commencing on page 23. The first, concerning the intent of the parties, was in direct conflict. In spite of the fact that the testimony was evenly balanced between two interested parties, the District Court ignored the question of burden of proof and held for appellees.

The statement of the District Court to the effect that the only thing that gave him any concern was that the proposal of May 9, Ex. 8, is marked "revised," Tr. 396, is indicative that he did not consider Ex. 17, in connection with Ex.

7, to determine its meaning.

The finding that the word "revised" written on appellees' bid by Mr. Rushlight meant a revision in price rather than a revision in plans or work, violated several rules of law. The testimony on the matter was evenly balanced and again the appellee had the burden of proof; an officer of the appellee had written it there and it should have been construed against the appellee; the parties had used the word "revised" many times previously to mean revised plans or work; there was no substantial evidence of a prior price to revise; and the construction given was not a reasonable one.

The appellees, on page 24 of their brief, quote a portion of the District Court's statement with regard to the credibility of the appellant. The balance of the statement is as follows:

"On the other hand if we adopt the testimony of Mr. Anderson then Mr. Rushlight's evidence and that of his witness, Hall, is not worthy of credence." Tr. 391, 2.

The District Court immediately thereafter found that appellee never submitted a bid prior to the bid opening in the sum of \$300,000.00 or in any sum. Tr. 392. Yet appellees are still here contending they did and the witness Rushlight many times testified he did. Tr. 116, 161, 162.

IV.

The appellees take the position that the appellant testified falsely because the District Court found against him. We submit that is not the test. The mere fact that the District Court made Findings of Fact inconsistent with the testimony of appellant as well as with the appellees' witness, Mr. Rushlight, does not mean that appellant testified falsely. Our examination of Mr. Anderson's testimony as a whole shows that he did not in fact testify falsely.

However, an examination of Mr. Rushlight's testimony indicates that his memory was very poor, except when testifying to some point in which he was vitally interested. We point out a few instances which illustrate this point:

Rushlight testified:

"Yes, sir, I was in error, and the only thing I could do since my memory is refreshed by these specific cases is to say to you I was in error—my testimony was wrong, to be honest and proper with this court." Tr. 422, 423.

Although Mr. Rushlight testified to details that occurred at the meeting of May 9, he was unable to state where he came from or how he got to Tacoma on that important occasion. Tr. 423.

"Q. Mr. Rushlight, you and Mr. Hall came

to Tacoma on May 9 to Mr. Anderson's house?

"A. Yes, sir, I believe that was the date, Mr. Peterson.

"Q. And where did you come from?

"A. Well—

"Q. To Tacoma.

"A. I don't recall where we came from now, Mr. Peterson.

"Q. I will ask you whether or not you lived at Portland?

"A. Yes, sir.

"Q. And you came up to Seattle on the train, did you?

"A. I don't recall how we got up there.

"Q. Well, do you recall whether you contacted Clyde Philp on May 9th at Seattle, and asked him to haul you to Tacoma?

"A. No, I don't remember that.

"Q. Huh?

"A. I don't believe that is so, not to the best of my recollection."

and on Tr. 424, the witness testified:

"Q. Who was present at the Anderson house that night?

“A. Well to the best of my recollection there was Mr. Anderson’s son who testified in this case, Mr. Anderson and his wife and daughter and Mr. Hall.

“Q. Was Clyde Philp there?

“A. I don’t recollect—I don’t believe Mr. Philp was there. I don’t recollect Mr. Philp being there.”

Mr. Philp, who was a partner with Mr. Rushlight[†] on certain construction jobs, testified that he drove Rushlight and Hall to the meeting and was present all during the conversations. Tr. 434, 435.

An examination of that portion of Mr. Rushlight’s testimony, which appears in the Transcript, will indicate several other instances where his memory was faulty and where he was manufacturing the whole cloth. Under these circumstances the appellees’ charge that appellant was giving false testimony appears to be another case of the pot calling the kettle black.

The appellees state that because the Findings were based on controverted evidence, they are conclusive. As a matter of fact most of the evidence on which the Findings were based were irrelevant. However, the contracts between the parties, Ex. 7 and 17, and the testimony of Mr. Wyatt were not contradicted and are sufficient to sustain appellant’s position that these boilers were not an

extra. The rule cited, we submit, is inapplicable here.

V.

The appellees state: "(1) That the substituted or revised work was not mentioned in the proposal of May 9, Ex. 8." That proposal is the one that bears the word "revised" in Mr. Rushlight's own handwriting.

The appellees also state: "(3) was not actually formally ordered by the government until 'Change Order A,' Ex. 26, dated May 23." This is contrary to the evidence of Col. E. P. Antonovich, the Contracting Officer, a witness called by appellees. Tr. 267.

The appellees state: "(4) That this change order revision was treated as a separate independent item and extra, throughout, by both the government and these parties." There is no evidence that the appellant treated this item as an extra at any time.

The statement that Ex. 11 is a change order is likewise incorrect. As previously stated in this brief, the most that can be said of that exhibit is that it is an instruction to proceed. There is no agreement or inference in that exhibit that appellant would pay extra for this work. The president of appellee admitted he never construed it to

be an agreement to pay any extra cost, Tr. 157. Counsel cannot now repudiate his client's position and take a contrary position.

The explanation given as to the reason for the purchase of the boilers from the Roy T. Early Co. on May 6 is indicative of appellees testimony throughout, but it does not explain away the fact that at the time the subcontract was entered into Rushlight knew that appellant was entitled to deduct therefrom the cost of the revised boilers, in the sum of \$16,924.00 paid to Early for the boiler installation, by the appellant. Ex. 17, Tr. 212-216.

Counsel seems to feel agrieved that we take the position that appellees did not install the revised boilers and that they were in fact installed by the Roy T. Early Co. However, they do not contend that Early did not in fact supply and install the boilers, but claim they furnished some of the incidental parts. An examination of Ex. 7, shows that appellee was to furnish all of the mechanical equipment as well as the Plumbing and Heating and it is not surprising they did furnish incidental items. However, they never furnished the revised boilers but Early did and received his \$16,924.00 contract price from the appellant for so doing.

Counsel has not even seen fit to discuss the authorities cited in the opining brief. In spite of this, those authorities lay down the rules of law

applicable in this case and we submit they should be followed in this case.

V (2)

The appellees' position with regard to the contract requirement of filing a claim within one week is difficult to follow and is confusing. They do not claim waiver of the provision and admit it is enforceable. In spite of that, at no time do they inform us when a claim was filed but refer us to Exhibit 4, Exhibit 10, and Exhibit 11, none of which are, or purport to be, a claim, such as is contemplated by the subcontract. Ex. 7, Tr. 76.

Exhibit 4 was executed prior to the time appellant had any contract with the government, and was by appellees' own admission nothing but a proposal. Tr. 126.

Exhibits 10 and 11 might be construed as an order in writing under Sec. 4 of the Subcontract, reading in part as follows:

“. . . no charge for extras shall be paid to the subcontractor unless ordered in writing by the General Contractor . . .” Ex. 7, Tr. 74.

However, they could not be deemed to comply with Sec. 5 (b), reading as follows:

“To make all claims for extras of every kind and nature in writing within one week from the date that said claimed extra is in-

curred." Ex. 7, Tr. 76.

It is immaterial here whether the week commenced on May 6, or on May 15, or when the work was done, as there is no evidence of a claim being submitted within one week from any of those dates. As stated in appellant's opening brief, with reputable authority cited, such a showing is a condition precedent to recovery.

Nor can such a contract provision be ignored by saying that ". . . the owner was at all times fully advised in writing on this point and himself gave the extra order."

The provision relative to orders in writing (Sec. 4) and the provision relative to claims (Sec. 5), are independent and must both be complied with. It is not sufficient to comply with one or the other.

VI

Throughout this brief we have called this court's attention to errors and inconsistencies contained in Finding of Fact X. It would only lengthen this brief without adding anything new to repeat them. We decline to unnecessarily burden this court with such repetitive matter and refer to the preceding portions of the brief in this connection.

SUMMARY

The appellees have failed to answer in their brief the questions involved in this appeal and have ignored the authorities cited in support of appellant's contentions. It must be assumed, therefore, that they are unable to answer the questions or distinguish the authorities.

The position taken by appellees, that the item in question was an extra as a matter of law, rests wholly upon the assumption that there is an ambiguity and that the contract should be construed against the appellant for the reason that the contract was prepared by him. That position is untenable when the surrounding circumstances and the contract with Early, Exhibit 17, are considered.

The position that the item was an extra as a matter of fact is contrary to the documentary evidence and the admission of knowledge of the revisions prior to the execution of the subcontract.

The failure of appellees to prove the filing of a written claim for extras within one week after the claimed extra was incurred likewise is a conclusive answer to the contentions of appellees.

CONCLUSION

It is apparent from the District Court's opinion

that the correct conclusion on this matter became lost in a multitude of conflicting evidence. However, the documentary evidence and the uncontradicted evidence on the surrounding circumstances should be more than adequate to establish that the item involved was required by the contract and did not constitute an extra. In addition the appellees are precluded by failing to file the necessary claims.

We submit that the District Court should be reversed and the item appealed from should be disallowed.

Respectfully submitted,
DUPUIS & FERGUSON,
Attorneys for Appellants.



No. 10931

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JENNINGS BRYAN, JR., Individually and
as Collector of Customs for the Port of Los Angeles,
Customs Collection, District No. 27,

Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA, a cor-
poration,

Appellee.

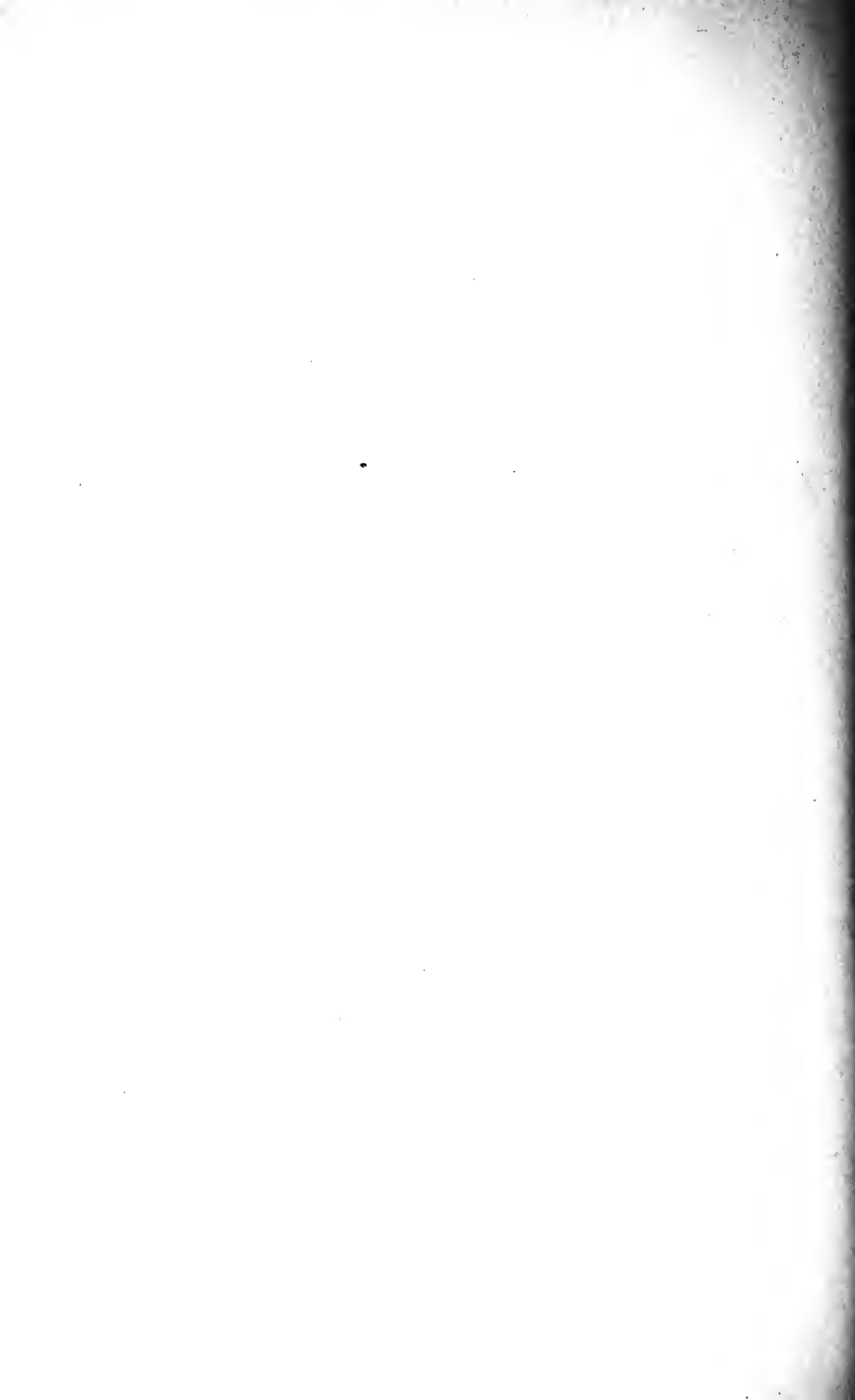
TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

FEB 14 1945

PAUL P. O'BRIEN,
CLERK



No. 10931

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United States Circuit Court of Appeals

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Upon Appeal from the District Court of the United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

CHARLES H. CARR,
United States Attorney,

RONALD WALKER,

WM. W. WORTHINGTON,
Assistants U. S. Attorney,

600 U. S. Post Office and Court House Bldg.
Los Angeles 12, Calif.

For Appellee:

WALTER I. CARPENETI,
354 S. Spring Street
Los Angeles 13, Calif. [1*]

In the District Court of the United States for the
Southern District of California, Central Division

Civil No. 1749- O'C

UNION OIL COMPANY OF CALIFORNIA, a cor-
poration,

Plaintiff,

vs.

WILLIAM JENNINGS BRYAN, JR., individually and
as Collector of Customs for the Port of Los Angeles,
Customs Collection District No. 27,

Defendant.

BILL OF COMPLAINT FOR RECOVERY OF TON-
NAGE DUTY OR TAX ILLEGALLY EX-
ACTED BY THE COLLECTOR OF CUSTOMS.

Comes now the above-named Plaintiff, and respectfully
shows:

I

Plaintiff is a corporation organized and existing under
the laws of the State of California, having been incorpo-
rated in the year 1890 for the purpose of exploring, min-
ing, extracting, producing, refining, selling, importing,
exporting, distributing and transporting by land and sea,
petroleum, oil, hydrocarbon substances and their by-
products and derivatives; that Plaintiff is a citizen of the
State of California with its principal place of business in
Los Angeles, California.

II

That Defendant William Jennings Bryan, Jr., is the
duly appointed, qualified and acting Collector of Customs
in and for Customs Collection District No. 27, and Port

of San Luis, California; that among other duties of the said Defendant as such Collector of [2] Customs, he is charged, under the laws of the United States, with the supervision, authority and control over the entrance and clearance of vessels arriving at said Port from foreign ports; and with the exaction and collection of entrance and clearance fees and the collection of tonnage duty or tax on vessels arriving at said Port from foreign countries; that said Defendant is a citizen of the State of California and resides in the said city and county of Los Angeles, State of California.

III

That this is a suit at law of a civil nature, arising under the Constitution and the laws of the United States providing for the collection of a tonnage duty or tax, as is hereafter more fully set forth, and is a case of actual controversy between the Plaintiff and the Defendant involving the validity, force and effect of a law of the Congress of the United States of America under the Constitution of the United States of America.

IV

That Plaintiff now is, and was at all times herein mentioned, the owner and operator of an ocean-going vessel of 5107 net tons, which said vessel is known as the American Tank Steamer "Montebello", and at all times herein mentioned was registered to engage in the foreign trade under the laws of the United States, at the Port of Los Angeles, and at all times herein mentioned was used and employed by the Plaintiff in transporting Plaintiff's products in the foreign trade.

That Plaintiff was the payor of all fees, duties, and taxes herein mentioned.

V.

That the said vessel, on October 23, 1940, at Los Angeles, California, loaded 20,163 barrels of crude petroleum, 29,903 barrels of fuel oil and 25,328 barrels of diesel oil, destined for [3] discharge at various ports in Chili, and on said date cleared from the Port of Los Angeles to the Port of Iquique, Chile.

That the said vessel, on November 12, 1940, discharged 11,241 barrels of fuel oil at Iquique, Chile, and cleared for Valparaiso, Chile, where on November 17, 1940, the said vessel discharged 19,905 barrels of crude oil; that said vessel thereupon cleared for Antofagasta, Chile, where it discharged the remaining cargo. .

That the said vessel then proceeded in ballast to Talara, Peru, and on November 27, 1940, loaded 76,984 barrels of crude petroleum and cleared for Ioco, British Columbia, where the entire cargo was discharged on December 17, 1940.

That the said vessel then proceeded in ballast to Port San Luis, California, arriving on December 24, 1940.

VI.

That on the entry of said vessel at the Port of San Luis as aforesaid, the Defendant did then and there require and demand of and receive from the said Plaintiff the payment of tonnage duty or tax at the rate of 6 cents per ton or in the total sum of Three Hundred Six and Forty-two One-Hundredths (\$306.42) Dollars, which payment is covered by tonnage tax certificate number 440664.

VII

That the Plaintiff and the Master of said vessel complied with all the laws, rules and regulations, terms and provisions in connection with and entitling said vessel to pay tonnage tax or duty at the rate of 2 cents per ton.

VIII

That the demand and collection of the said tonnage duty or tax in excess of 2 cents per ton from the Plaintiff was and is illegal, arbitrary, oppressive and deprives Plaintiff of his property without due process of law. [+]

Wherefore, Plaintiff prays for judgment in the sum of Two Hundred Four and Twenty-eight One-Hundredths (\$204.28) Dollars, together with costs of suit, interest from date of exaction, and such other relief as the court may deem meet in the premises.

Dated: Los Angeles, California, August 29, 1941.

UNION OIL COMPANY OF CALIFORNIA,
Plaintiff,

By ABRAHAM GOTTFRIED
ABRAHAM GOTTFRIED
Attorney for Plaintiff.

Address:

Abraham Gottfried
354 South Spring Street
Los Angeles, California
MUtual 9492

[Endorsed]: Filed Sep. 2, 1941. [5]

[Title of District Court and Cause.]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND OTHER RELIEF

The defendant, William Jennings Bryan, by his attorney, William Fleet Palmer, respectfully moves this court for summary judgment and dismissal of the complaint in the above entitled action, upon the ground that there is no substantial issue as to any material fact and defendant is entitled to judgment in his favor as a matter of law in that:

1. The Act of July 5, 1884, c. 221, sec. 3, as amended and supplemented, (46 U. S. C. 3), provides that the decisions of the Director of the Bureau of Marine Inspection and Navigation in tonnage tax refund cases shall be final, and therefore this court has no jurisdiction to review his decisions, nor can this court substitute its judgment for that of the Director.

2. The vessel was entered as from Talara, Peru, and tonnage tax and duty at the six-cent rate was proper.

This motion is based on the complaint and on the annexed affidavits and certified copies of documents attached thereto.

Wm. Fleet Palmer

United States Attorney [6]

[Title of District Court and Cause.]

AFFIDAVIT

District of Columbia, City of Washington—ss.

I, R. S. Field, being duly sworn on oath, deposes and says:

1. That he is the Director of the Bureau of Marine Inspection and Navigation, Department of Commerce.

2. That annexed hereto are certified copies of documents on file with the Director of the Bureau of Marine Inspection and Navigation, Department of Commerce, upon which action was taken, namely:

Exhibit A: Oath of Master of Montebello on entry San Luis, California.

Exhibit B: Letter from Deputy Collector at San Luis to Collector at Los Angeles, dated May 9, 1941.

Exhibit C: Letter from Collector at Los Angeles to Director, Bureau of Marine Inspection and Navigation, dated May 14, 1941. [7]

Exhibit D: Letter from Union Oil Company of California to Director, Bureau of Marine Inspection and Navigation, dated May 7, 1941.

Exhibit E: Letter from Director, Bureau of Marine Inspection and Navigation to Collector at Los Angeles, dated May 21, 1941.

Exhibit F: Letter from Director, Bureau of Marine Inspection and Navigation to Deputy Collector at San Pedro, dated January 25, 1939, in the case of the On-

tariolite, which case was cited both in letter of the Union Oil Company (exhibit D) and in the decision of the Director, Bureau of Marine Inspection and Navigation (exhibit E).

Exhibit G: Letter from Director, Bureau of Marine Inspection and Navigation to Deputy Collector at San Pedro dated February 24, 1938, in the case of the Rotterdam, which case was cited both in the letter of the Union Oil Company (Exhibit D) and in the decision of the Director, Bureau of Marine Inspection and Navigation (exhibit E).

R. S. Field

Sworn to and submitted before me on the 17 day of January, 1942.

(Seal)

F. B. Myers
Notary Public

[Endorsed]: Filed Jan. 31, 1942. [8]

DEPARTMENT OF COMMERCE

Washington, November 26, 1941

I hereby certify that the annexed is a true photostatic copy of the original oath of the Master of the Montebello on his entry from Talara, which is certified by the Deputy Collector at Port San Luis, May 9, 1941 on file at the offices of the Bureau of Marine Inspection & Navigation.

R S Field
Director
(Official title)

OFFICE OF THE SECRETARY

I hereby certify that Richard S. Field who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Marine Inspection & Navigation and that full faith and credit should be given his certificate as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 26th day of November, one thousand nine hundred and 41.

For the Secretary of Commerce:

[Seal]

E W Libbey
Chief Clerk [9]

Copy

UNITED STATES CUSTOMS SERVICE

[Not legible.]

Nationality American
Crew 39.

Master's Oath on Entry of Vessel From Foreign Port

I, M. Andreasen, solemnly swear that I am now and was during this voyage the master of the American S/S "Montebello" that arrived at Port San Luis, Calif., on (Flag, rig or power, name)

December 24, 1940; that this voyage began at Talara, Peru on November 28, 1940, and included the following ports from which said vessel sailed in the order and on the date stated, viz, Vancouver, B. C. 12/17/40. that the manifest subscribed in my name, and now delivered by me to the Collector of the Port named above, contains, to the best of my knowledge and belief, a just and true account of all the goods, wares, and merchandise, includ-

ing packages of every kind and nature whatsoever, which were laden or taken on board the above-named vessel at the said ports or at any time since at other ports or places, together with the names of the passengers and the number of pieces of baggage taken by each passenger at such ports, and that clearance and other papers now delivered by me to the Collector are all that I now have, or have had, that in any way relate to the cargo of the said vessel; and I do further swear that the several articles specified in the said manifest as sea and ship stores are truly such and are solely for use on the vessel or for the use of the officers, crew, and passengers, and are not intended for sale, or for any other purpose than above mentioned. And I further swear that if I shall hereafter discover or know of any other or greater quantity of goods, wares, and merchandise of any nature or kind whatsoever than are contained in this manifest, I will immediately and without delay make due report thereof to the Collector; and I do likewise swear that all matters whatsoever, in the said manifest are, to the best of my knowledge and belief, just and true; and I further swear that there has been no previous inspection and certification by customs officers of this manifest. I further swear that I have delivered or caused to be delivered to the proper postal officers all mail on board the said vessel during her last voyage. And I further swear, if entering at a sub-comptroller office port, that before entering said vessel at the customhouse I mailed to the comptroller of customs having jurisdiction over the accounts of the collection district in which entry of the vessel is to be made, a true copy of the manifest.

And, if master of an American vessel, I further swear that the statement of services performed by consular agents contains only such services as were necessarily and

actually performed at my request: and I further swear that in all cases where consular services were required and performed, statements of such services were given me by such consular officers, except at the ports of and that I have no other papers relating to consular transactions. I further swear that the register of the said vessel, herewith presented, contains the name or names of the owner or owners of said vessel, except, and that no foreign subject or citizen has, to the best of my knowledge and belief, any share, by the way of trust, confidence, or otherwise, in the said vessel.

Sgd: M. Andreasen,
Master.

Sworn to before me on December 24, 1940

Sgd: E. A. Palfrey,
a Acting Deputy Collector.
Port San Luis, Calif., May 9, 1941.

I Certify this to be a true and correct copy of the Original filed at this office.

E. F. James
Deputy Collector.

Time entered: 9:30 A. M.

Deaths nil

Tonnage 5107 net.

Tonnage tax certificate No. 440664

Fee certificate No. 944118.

Fees under Sec. 2654, R. S. 2.50

Fees under Sec. 4186, R. S. —

Tonnage duty \$306.42 Date 1st., Payment 12/24 40

Date last payment—12/24/40.

Tonnage certificate fee

(Foreign vessels) [10]

DEPARTMENT OF COMMERCE

Washington, November 26, 1941

I hereby certify that the annexed is a true photostatic copy of the original letter dated May 14, 1941, to the Director of the Bureau of Marine Inspection & Navigation from the Collector of Customs at Los Angeles, California on file in the offices of the Bureau of Marine Inspection & Navigation

R S Field
Director
(Official title)

OFFICE OF THE SECRETARY

I hereby certify that Richard S. Field who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Marine Inspection & Navigation and that full faith and credit should be given his certificate as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 26th day of November, one thousand nine hundred and 41.

For the Secretary of Commerce:

[Seal]

E W Libbey
Chief Clerk [11]

In Reply Refer to: 140.
Amer. S. S. "Montebello".

TREASURY DEPARTMENT

United States Customs Service

Los Angeles, Calif. May 14, 1941.

[Crest]

Office of the Collector

District No. 27

Address All Communications

For This Office to the Collector

May 20

| 4 | | | |

Director,

Bureau of Marine Inspection and Navigation,

Department of Commerce,

Washington, D. C.

Sir:

In accordance with the provisions of Art. 135, Customs Regulations of 1937, and Bureau of Navigation General Letter No. 270, dated April 7, 1925, there is transmitted herewith the application in duplicate, of the Union Oil Company of California, for refund of excess tonnage tax collected in the amount of \$204.28, which it is alleged was exacted in error upon arrival of the vessel at the port of Port San Luis, California, on December 24, 1940, from Talara, Peru, via Vancouver, B. C., Canada, the applicant stating that collection was made at the 6-cent rate whereas assessment of tonnage tax should have been made at the 2-cent rate.

In connection with the application for refund there is transmitted herewith copy of report from the Deputy Collector in Charge, Port San Luis, California, dated May 9, 1941, wherein the facts as to the assessment and collection of tonnage tax in this case are outlined. Copy of Customs Form 3251, Master's Oath on Entry of Vessel from Foreign Port, which outlines the voyage is also submitted herewith. It will be noted in statement made in the letter of the Deputy Collector in Charge at Port San Luis, California, that the voyage began at Talara, Peru, and included Vancouver, B. C., Canada, and was ended at Port San Luis, California, on December 24, 1940. It will be noted that in view of the facts as set forth after due inquiry it was the opinion that tonnage tax was due at the maximum rate and assessment and collection were made accordingly.

It will be appreciated if you will kindly advise this office as to your decision in this case at as early a date as practicable.

Respectfully,

Wm. Jennings Bryan, Jr.,
Collector of Customs,

By: Chas. W. Salter
Assistant Collector of Customs.

Legal Division Bureau of Marine Inspection & Navigation Dept. of Commerce May 20 1941 Inc. Washington, D. C. [12]

DEPARTMENT OF COMMERCE

[Not legible]

Washington, November 26, 1941

I hereby certify that the annexed is a true photostatic copy of the original letter dated May 7, 1941, to the Director of the Bureau of Marine Inspection & Navigation from the Union Oil Company of California on file in the offices of the Bureau of Marine Inspection & Navigation

R S Field
Director
(Official title)

OFFICE OF THE SECRETARY

I hereby certify that Richard S. Field who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Marine Inspection & Navigation and that full faith and credit should be given his certificate as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 26th day of November, one thousand nine hundred and 41.

For the Secretary of Commerce:

[Seal]

E W Libbey
Chief Clerk. [13]

San Pedro 4870

GUY B. BARHAM COMPANY

Established 1890

Custom House, Ship and Export Brokers, Freight
Contractors, Forwarding, Distributing, Marine
and General Insurance Agents

354 South Spring Street

Los Angeles, California

Cable Address

"Barhamco"

Los Angeles

1890

[Crest] 50 Years of Service

1940

Harbor Office

105 W. Seventh Street

San Pedro, California

San Pedro, California.

May 7th, 1941.

To the
Director

Bureau of Navigation and Marine Inspection,
Washington, D. C.

Sir:

The American Tank Steamer "Montebello" arrived at Port San Luis, California, on December 24th, 1940, from Vancouver, B. C., Canada, in ballast, and was erroneously assessed tonnage tax at the maximum rate, same amounting to \$306.42 covered by tonnage tax certificate No. 440664.

On the previous voyage the vessel loaded at Los Angeles, California, on October 23rd, 1940, said cargo being discharged at Iquique, Valparaiso and Antofagasta, Chile.

The vessel proceeded in ballast to Talara, Peru, loading a cargo there on November 27th, which was dis-

charged at Vancouver, B. C., Canada, on December 17th, 1940.

Vessel then proceeded in ballast to Port San Luis, California, and we contend that tonnage dues should have been assessed at the minimum rate. This in accordance with Department decisions of Feb. 24, 1938 in the "Rotterdam" case and those covering several similar voyages of the Br. MS "Ontariolite", decisions dated Sept. 22, 1938 and that of January 25, 1939, your file 3-30349.

We, therefore, make application for the refund of \$204.28, the amount of tax erroneously assessed.

Respectfully yours,

Union Oil Company of California, Owners.
By [Not legible] Atty-in-Fact.

Subscribed and Sworn to before me this 7th day of May, 1941.

[Not legible]

Members of the Los Angeles Chamber of Commerce
Since 1894 [14]

DEPARTMENT OF COMMERCE

Washington, November 26, 1941

I hereby certify that the annexed is a true photostatic copy of the original letter from the Deputy Collector of Customs at the Port of San Luis to the Collector of Customs at Los Angeles, dated May 9, 1941 on file in the offices of the Bureau of Marine Inspection & Navigation

R S Field
Director
(Official title)

OFFICE OF THE SECRETARY

I hereby certify that Richard S. Field who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Marine Inspection & Navigation and that full faith and credit should be given his certificate as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 26th day of November, one thousand nine hundred and 41.

For the Secretary of Commerce:

[Seal]

E W Libbey
Chief Clerk. [15]

[Not legible]

3-7643

Port San Luis, Calif.,
May 9, 1941.

Collector of Customs,
Los Angeles, Calif.

Copy

Sir:

Reference is made to the enclosed application, filed by the Union Oil and Guy B. Barham Company, for the refund of \$204.28, the amount of tonnage tax claimed erroneously assessed on the American Tank Steamer "Montebello", of the Union Oil Company, upon entry at this port on December 24, 1940.

Records at this office show on the Masters Oath, Customs Form No. 3251, filed at the time of entry that this voyage began at Talara, Peru, on November 28, 1940,

included Vancouver, B. C., on December 17, 1940, and ended at Port San Luis, Calif., on December 24, 1940.

Inquiry of Captain Andreasen, the Master, at time of entry developed that on October 23, 1940, the crew was signed for a voyage to Iquique, Valparaiso and Antifagasta, Chile, of not over six months and back to a Pacific Coast port to be designated by the Master.

After discharging cargo at ports as above stated, the vessel proceeded to Talara, Peru, where cargo was laden for Vancouver, B. C., also crewpurchases; Sailing from there November 28, 1940.

Upon arriving and discharging cargo only at Vancouver, B. C., on December 17, 1940, the vessel sailed the same day in ballast for Port San Luis, Calif., arriving here December 24, 1940, where, after entry, the crew was paid off. crew purchases entered, the Document changed from Register to Enrollment, the voyage officially ended and the vessel engaged in coastwise trade.

In view of the Masters statements, verified by inquiry, that it was known to him at the time of lading Vancouver cargo at Talara, that the voyage would end at Port San Luis, Calif., tonnage tax at the maximum rate, in the amount of \$306.42, was assessed and collected and deposited in Special Deposit, for which S. D. No. 4, dated December 27, 1940, was issued.

Certified copy of Customs Form No. 3251, together with application in triplicate here enclosed.

Respectfully,

E. F. James

E. F. James,

Deputy Collector in Charge.

DEPARTMENT OF COMMERCE

Washington, November 26, 1941

I hereby certify that the annexed is a true photostatic copy of the original decision of the Bureau of Marine Inspection and Navigation in the case of the Montebello on file in the offices of the Bureau of Marine Inspection & Navigation

R S Field
Director
(Official title)

OFFICE OF THE SECRETARY

I hereby certify that Richard S. Field who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Marine Inspection & Navigation and that full faith and credit should be given his certificate as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 26th day of November, one thousand nine hundred and 41.

For the Secretary of Commerce:

[Seal]

E W Libbey
Chief Clerk. [17]

May 21, 1941

3-7643

Subject: Refund tonnage tax

American Steamer Montebello (221100)

My dear Mr. Collector:

The Bureau has your letter of May 14, 1941, where-with you transmitted an application submitted by the Union Oil Company of California, owner of the American Tank Steamer Montebello, seeking a refund of tonnage taxes alleged to have been collected in excess from this vessel upon the occasion of her entry at Port San Luis, California, on December 24, 1940, from Talara, Peru, via Vancouver, B. C., Canada.

The affiant in its petition for refund states that the vessel loaded a cargo at Talara, Peru, for discharge at Vancouver, B. C.; that the vessel discharged all her cargo at Vancouver, and thereafter proceeded in ballast to Port San Luis; and that the facts in this case are analogous to the facts in the cases of the Netherlands SS Rotterdam and the British MS Ontariolite.

Your office has submitted an affidavit, executed by Captain M. Andreasen, master of the Montebello, in which Captain Andreasen has stated that the voyage from which his vessel entered the Port of San Luis, California, on December 24, 1940, originated at Talara, Peru, on November 28, 1940, and included the Port of Vancouver, B. C.

From the information submitted by the Deputy Collector of Customs in Charge at Port San Luis, California,

it appears that the crew of the *Montebello* was signed on for a voyage to ports in Chile and back to a Pacific Coast port to be designated by the master. It also appears that upon the discharge of the vessel's cargo at Vancouver, she sailed in ballast for Port San Luis, California, where the crew was paid off, the voyage officially ended, the vessel's document changed from registry to enrollment, and the vessel proceeded to engage in the coastwise trade. [18]

The facts in the instant case are not analogous to the facts in the cases of the British SS *Ontariolite*, for in the cases of the *Ontariolite* the vessel loaded cargoes at Talara, destined for discharge at Vancouver, B. C., Canada; all the cargoes laden on board at Talara, Peru, were discharged in Canada, and the vessel in both cases proceeded in ballast to Port San Luis to load a full cargo of crude oil for discharge at Ioco, B. C., Canada.

Neither are the facts in the instant case analogous to the facts in the case of the *Rotterdam*, for in that case the vessel took on cargo at Cutuco, El Salvador, for discharge at Bowling, Scotland, via your port.

In the case of the *Montebello*, it was the obvious intention of the vessel, upon her departure from Talara, Peru, to commence a voyage, the port of origin of which was Talara, and the port of ultimate destination of which was Port San Luis, California, via Vancouver, B. C.

This is borne out by the affidavit of the master of the *Montebello*, the paying off of the crew at Port San Luis, and the changing of the vessel's document from registry to enrollment and license.

In view of the foregoing, the action of your office in assessing maximum tonnage taxes upon the entry of the Montebello at your port on December 24, 1940, is approved, and the application of the Union Oil Company of California is denied.

Sincerely yours,

R. S. Field
R. S. Field
Director

Collector of Customs
Los Angeles, California
F. K. Arzt—ss [19]

DEPARTMENT OF COMMERCE

Washington, November 26, 1941

I hereby certify that the annexed is a true photostatic copy of the original decision of the Bureau of Marine Inspection & Navigation in the case of the Ontariolite on file in the offices of the Bureau of Marine Inspection & Navigation

R S Field
Director
(Official title)

OFFICE OF THE SECRETARY

I hereby certify that Richard S. Field who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Marine Inspection & Navigation and that full faith and credit should be given his certificate as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 26th day of November, one thousand nine hundred and 41.

For the Secretary of Commerce:

[Seal]

E W Libbey
Chief Clerk. [20]

January 25, 1939

Deputy Collector of Customs in Charge 3-30349
San Pedro, California

My dear Mr. Collector:

The Bureau is in receipt of an amended petition submitted by the Imperial Oil Shipping Company, Ltd., owner of the British motorship *Ontariolite*, through Guy B. Barham Company, seeking a refund of tonnage taxes alleged to have been collected in excess from this vessel upon the occasion of her arrival at Port San Luis, California, on October 12, 1937.

From the information before the Bureau, it appears that your office is of the opinion that this vessel is in regular trade with Port San Luis, and that when she left Talara, Peru, on the voyage in question, her ultimate destination was Los Angeles, California, via Vancouver, B. C.

The application of the owner of the vessel in question indicates that the *Ontariolite*, in the case under consideration, loaded a cargo at Talara, Peru, destined for discharge at Vancouver, B. C., Canada; that all the cargo laden on board at Talara, Peru, was discharged in Canada; and that the vessel proceeded in ballast to Port San

Luis to load a full cargo of crude oil for discharge at Ioco, B. C., Canada.

The Bureau over a period of years has determined that in order to effectively carry out the intent and purpose of Section 14 of the Act of June 26, 1884, as amended, it is necessary to consider the port of origin of the voyage of the vessel, and the port of ultimate destination, as well as the port from which the vessel entered at a port in the United States.

From the facts submitted by your office and the petitioner, it appears that the voyage of the *Ontariolite* from Talara, Peru to Port San Luis was not a single voyage with the stop at Vancouver, B. C. as a mere incident in the voyage and not a break in the continuity thereof, but that the voyage from Talara, Peru, terminated at Vancouver, B. C. upon the complete discharge of the [21] cargo laden at Talara, and that a new voyage, the port of origin of which was Vancouver, B. C., and the port of ultimate destination of which was Ioco, B. C., via Port San Luis, was commenced.

Hence, it would seem that upon the arrival of the *Ontariolite* at Port San Luis on October 12, 1937, tonnage tax at the minimum rate of 2¢ rather than at the maximum rate of 6¢ was assessable, and therefore the petition for refund of the difference between the maximum and minimum tonnage tax rates is granted.

Your office is requested to advise Guy B. Barham, agent of the *Ontariolite*, of the Bureau's decision in the premises in order that it may, if it so desires, file a petition on Cat. 1086 for a refund of the difference in the tonnage tax referred to herein.

When Guy B. Barham Company transmitted the corrected application for relief submitted by the Imperial Oil

Shipping Company, Ltd., it stated that it has not been advised of the Bureau's decision in connection with the application for refund submitted under date of September 2, 1938.

Upon a review of the Bureau's files, it is observed that on September 22, 1938, your office was informed that the petitions for refund of the difference between the maximum and minimum tonnage tax rates was granted in the instance of the arrival of the *Ontariolite* at your port on December 26, 1937, and July 6, 1938. The petition for refund, under date of September 2, 1938, to which Guy B. Barham Company refers, was the petition in connection with the arrival of the *Ontariolite* at your port on July 6, 1938. Therefore, since the Bureau has informed you as to the proper disposition of this petition for refund, you are requested to so advise Guy B. Barham Company.

Sincerely yours,

R. S. Field

R. S. Field

Director [22]

DEPARTMENT OF COMMERCE

Washington, November 26, 1941

I hereby certify that the annexed is a true photostatic copy of the original decision of the Bureau of Marine Inspection & Navigation in the case of SS *Rotterdam* on file in the offices of the Bureau of Marine Inspection & Navigation

R S Field

Director

(Official title)

OFFICE OF THE SECRETARY

I hereby certify that Richard S. Field who signed the foregoing certificate, is now, and was at the time of signing, Director, Bureau of Marine Inspection & Navigation and that full faith and credit should be given his certificate as such.

In witness whereof, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 26th day of November, one thousand nine hundred and 41.

For the Secretary of Commerce:

[Seal]

E W Libbey
Chief Clerk. [23]

February 24, 1938

3-8653

Deputy Collector of Customs in Charge
San Pedro, California

Dear Sir:

Reference is made to your letter of December 31, 1937 wherein your office furnished the Bureau with further information with regard to its action in assessing tonnage tax at the maximum six-cent rate against the Dutch motorship Rotterdam, upon the occasion of the entry of this vessel at your port on July 3, 1937.

It appears that your office based its action, in assessing the tonnage tax at the six-cent rate, upon the premise that the voyage of the Rotterdam, which terminated at your port on July 3, 1937, had as its port of origin, the port of Talara, Peru, and although the vessel stopped at several ports en route to fully discharge the cargo laden on board at Talara, Peru, your office did not deem the complete discharge of the vessel's cargo at minimum-rate

ports, a break in the continuity of the voyage, and, therefore, tonnage tax at the maximum rate was assessable.

Guy B. Barham Company, Agent for the Rotterdam, states that its principal's vessel loaded a cargo of gasoline and diesel fuel oil at Talara, Peru, which cargo was discharged at Balboa, Canal Zone, Corinto, Nicaragua and Cutuco, El Salvador.

It further states the voyage which emanated at Talara, Peru terminated at Cutuco, El Salvador and that a new voyage, in ballast, was commenced at Cutuco with the port of ultimate destination of the voyage as Bowling, Scotland with a stop at your port to take on cargo.

The Bureau, over a period of years, has determined that in order to effectively carry out the intent and purpose of Section 14 of the Act of June 26, 1884, as amended, it would be necessary to consider the port of origin of the voyage of the vessel and the port of ultimate destination, as well as the port from which the vessel [24] entered at a port in the United States.

From the facts submitted in the instant case, it appears that the voyage of the Rotterdam from Talara, Peru to your port was not a single voyage with the stops at the Canal Zone and Central American ports as mere incidents in the voyage and not a break in the continuity thereof, but that the voyage from Talara, Peru terminated at Cutuco upon the complete discharge of the cargo laden at Talara, and a new voyage, the port of origin of which was Cutuco and the port of ultimate destination of which was Bowling, Scotland via your port, was commenced.

Hence, it would seem that in the instant case tonnage tax at the minimum rate of two cents, rather than at the maximum rate of six cents was assessable upon the en-

try of the Rotterdam at your port from Cutuco, El Salvador, and, therefore, the petition for a refund of the difference between the maximum and minimum tonnage tax rates is granted.

Your office is requested to advise Guy B. Barham Company, Agent of the Rotterdam, of the Bureau's decision in the premises, in order that it may, if it so desires, file a petition on Cat. 1086 for a refund of the difference in the tonnage tax referred to herein.

Very truly yours,

H. C. Shephard,
Acting Director. [25]

AFFIDAVIT

Washington, D. C.

December 4, 1941

I, Richard S. Field, Director, Bureau of Marine Inspection and Navigation, Department of Commerce, Washington, D. C., do hereby state that any party in interest to a navigation fine case or to a matter involving the payment of tonnage taxes, is granted, upon request, an opportunity to present orally before the Bureau any statement or argument which he may care to make in the matter, either to the Director of the Bureau of Marine Inspection and Navigation, or to one of his qualified assistants.

I swear that the foregoing statements are true.

Richard S. Field
Richard S. Field,

Director Bureau of Marine Inspection & Navigation

Sworn to and subscribed before me this 4th day of December, 1941.

[Seal]

E. W. Libbey
Notary Public. [26]

[Title of District Court and Cause.]

NOTICE OF HEARING ON MOTION FOR
SUMMARY JUDGMENT

To the Plaintiff Union Oil Company of California and
Abraham Gottfried, Its Attorney:

You are hereby notified that defendant's Motion for Summary Judgment in the above entitled action will be heard in the courtroom of the Honorable J. F. T. O'Connor, Courtroom No. 7, United States Post Office and Court House, Los Angeles, California, on the 29th day of June, 1942 at 10:00 a. m. or as soon thereafter as counsel can be heard.

WM. FLEET PALMER

United States Attorney

James L Crawford

JAMES L. CRAWFORD

Assistant U. S. Attorney

Attorneys for Defendant.

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jun. 18, 1942. [27]

[Title of District Court and Cause.]

The motion of the defendant in the above entitled action for summary judgment is denied.

Dated this 11 day of September, 1942.

J. F. T. O'Connor

J. F. T. O'Connor

United States District Judge

[Endorsed]: Filed Sep. 11, 1942. [28]

Room 231 post office Building
Los Angeles, California,
Friday, September 11th, 1942.

Abraham Gottfried, Esq.,

Attorney at Law,

354 South Spring St.,

Los Angeles, Calif.

James L. Crawford, Esq.,

Asst. U. S. Attorney,

Post Office Building,

Los Angeles, Calif.

Gentlemen:

No. 1749 O'C. Civ. Union Oil Company of California,
a corporation vs. William Jennings Bryan, Jr., etc.

Please be informed that under date of September 11th,
1942, there was filed and entered an order denying the
motion of defendant for a summary judgment.

Yours very truly,

EDMUND L. SMITH, Clerk.

BY: Francis E. Cross

Francis E. Cross, Deputy [29]

[Title of District Court and Cause.]

NOTICE OF SUBSTITUTION OF ATTORNEYS
BY CONSENT

To the above named defendant, and to Leo V. Silverstein,
United States Attorney; its attorney:

Please Take Notice that I have substituted Walter I. Carpeneti as my attorney in the place and stead of Abraham Gottfried, and that said Abraham Gottfried has in writing consented to said substitution.

Dated: October 12, 1942.

UNION OIL COMPANY OF CALIFORNIA,
a corporation,

By J. B. Stene

Plaintiff.

Walter I. Carpeneti
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 15, 1942. [30]

[Title of District Court and Cause.]

SUBSTITUTION OF ATTORNEY

The plaintiff, UNION OIL COMPANY OF CALIFORNIA, a corporation, hereby substitutes WALTER I. CARPENETI as its attorney in the above-entitled action in the place and stead of Abraham Gottfried.

Dated: October 12, 1942.

UNION OIL COMPANY OF CALIFORNIA,
a corporation,

By J. B. STENE

I hereby consent to the substitution of Walter I. Carpeneti as attorney for plaintiff, Union Oil Company of California, in the above entitled action in my place and stead:

Dated: September 26, 1942.

Abraham Gottfried
Abraham Gottfried.

I hereby agree to be substituted in the place of Abraham Gottfried in the above-entitled action, as attorney for the plaintiff, Union Oil Company of California.

Dated: September 26, 1942.

Walter I. Carpeneti
Walter I. Carpeneti

[Endorsed]: Filed Oct. 15, 1942. [31]

[Title of District Court and Cause.]

ANSWER.

Comes now the defendant and for answer to the complaint herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph I of the complaint.

II.

Admits the allegations contained in Paragraph II of the complaint.

III.

Denies the allegations contained in Paragraph III of the complaint. [32]

IV.

Admits the allegations contained in Paragraphs IV, V and VI of the complaint.

V.

Denies the allegations contained in Paragraphs VII and VIII of the complaint.

Further answering and for a separate and complete defense.

VI.

Plaintiff herein on May 7, 1941, appealed to the Director of the Bureau of Marine Inspection and Navigation for a refund of the tonnage tax paid and, pursuant to the custom and regulations of that Bureau, who after a full, fair and adequate hearing denied the appeal, all as appears from the defendant's motion for summary judgment heretofore filed herein, which is incorporated by reference.

VII.

The Act of July 8, 1884, c. 221, Sec. 3, as amended and supplemented (U. S. C. Title 46, Sec. 3), provides that the decisions of the Director of the Bureau of Marine Inspection and Navigation in tonnage tax refund cases shall be final. Therefore, the Court is without jurisdiction to review his decision or to substitute its judgment for that of the Director.

Further answering and for a further separate and complete defense,

VIII.

On or about December 24, 1940, the Master of the SS Montebello, as required by law and existing regulations filed the Master's oath on entry, certifying that his voyage began at Talara, Peru. (Exhibit A, annexed hereto and made a part hereof.)

IX.

The crew of the Montebello on the voyage in question signed articles for a voyage to Iquique, Valparaiso, and Antofagasta, [33] Chile, of not over six months, and back to a Pacific Coast port to be designated by the Master, and after entry at Port San Luis, California, the crew were paid off.

X.

After entry at Port San Luis, the official ship's documentation of the Montebello was changed from Register to Enrollment, by her owners and operators, limiting her operation then to coastwise service.

XI.

The Montebello did enter from Talara, Peru, and tonnage tax and duty at the six cent rate was proper.

LEO V. SILVERSTEIN,
United States Attorney

James L. Crawford
JAMES L. CRAWFORD,
Assistant U. S. Attorney,

Attorneys for Defendant [34]

[Not legible]

EXHIBIT "A"

UNITED STATES CUSTOMS SERVICE

Crew 39.

MASTER'S OATH ON ENTRY OF VESSEL FROM
FOREIGN PORT

I, M. Andreasen, solemnly swear that I am now and was during this voyage the master of the American S/S "Montebello" that arrived at Port San Luis, Calif., on (Flag, rig or power, name)

December 24, 1940; that this voyage began at Talara, Peru on November 28, 1940, and included the following ports from which said vessel sailed in the order and on the dates stated, viz, Vancouver, B. C. 12/17/40.

.....

that the manifest subscribed in my name, and now delivered by me to the Collector of the Port named above, contains, to the best of my knowledge and belief, a just and true account of all the goods, wares, and merchandise, including packages of every kind and nature whatsoever, which were laden or taken on board the above-named vessel at the said ports or at any time since at other ports or places, together with the names of the passengers and the number of pieces of baggage taken by each passenger at such ports, and that clearance and other papers now delivered by me to the Collector are all that I now have, or have had, that in any way relate to the cargo of the said vessel; and I do further swear that the several articles

specified in the said manifest as sea and ship stores are truly such and are solely for use on the vessel or for the use of the officers, crew, and passengers, and are not intended for sale, or for any other purpose than above mentioned. And I further swear that if I shall hereafter discover or know of any other or greater quantity of goods, wares, and merchandise of any nature or kind whatsoever than are contained in this manifest, I will immediately and without delay make due report thereof to the Collector; and I do likewise swear that all matters whatsoever, in the said manifest are, to the best of my knowledge and belief, just and true; and I further swear that there has been no previous inspection and certification by customs officers of this manifest. I further swear that I have delivered or caused to be delivered to the proper postal officers all mail on board the said vessel during her last voyage. And I further swear, if entering at a sub-comptroller office port, that before entering said vessel at the customhouse I mailed to the comptroller of customs having jurisdiction over the accounts of the collection district in which entry of the vessel is to be made, a true copy of the manifest.

And, *if master of an American vessel*, I further swear that the statement of services performed by consular agents contains only such services as were necessarily and actually performed at my request; and I further swear that in all cases where consular services were required and performed, statements of such services were given me by such consular officers, except at the ports of.....

and that I have no other papers relating to consular transactions. I further swear that the register of the said vessel, herewith presented, contains the name or names of the owner or owners of said vessel, except....., and that no foreign subject or citizen has, to the best of my knowledge and belief, any share, by the way of trust, confidence, or otherwise, in the said vessel.

Sgd: M. Andreasen,

Master.

Port San Luis, Calif., May 9, 1941.

I Certify this to be a true and correct copy of the Original filed at this office.

E. F. James

Deputy Collector.

Sworn to before me on December 24, 1940.

Sgd: E. A. Palfrey,

a Acting Deputy Collector.

Time entered: 9:30 A. M.

Deaths nil

Tonnage 5107 net.

Tonnage tax certificate No. 440664

Fee certificate No. 944118.

Fees under Sec. 2654, R. S. 2.50

Fees under Sec. 4186, R. S.—

Tonnage duty \$306.42 Date 1st. Payment 12/24/40

Date last payment—12/24/40.

Tonnage certificate fee.....

(Foreign vessels)

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed, by and between the attorneys for the respective parties hereto, that the facts herein are as follows:

First: Plaintiff, Union Oil Company of California, is a corporation existing under the laws of the State of California, with its principal place of business in Los Angeles, California, and was incorporated in 1890 for the purpose of exploring, mining, extracting, producing, refining, selling, importing, exporting, distributing and transporting, by land and sea, petroleum, oil, hydrocarbon substance and their by-products and derivatives.

Second: Defendant, William Jennings Bryan, Jr., a citizen of the State of California, resident in the City and County of Los Angeles, California, is, and at all material times was, duly appointed and qualified as Collector of Customs for [36] the Port of Los Angeles, Customs Collection District No. 27, including the Port of San Luis, California, and among the duties of said defendant as such Collector of Customs under the laws of the United States was, and is, the supervision and the exercise of authority and control over the entrance and clearance of vessels arriving at the Port of San Luis from foreign ports: and the exaction and collection of entrance and clearance fees and the collection of tonnage duty or tax on vessels arriving at said Port of San Luis from foreign countries.

Third: Plaintiff now is and at all material times was the owner and operator of the American Tank Steamer Montebello, an ocean-going vessel of 5,107 net tons,

which at all material times was owned and operated by plaintiff and employed by plaintiff in transporting plaintiff's property.

Fourth: On or about October 23, 1940, said T/S Montebello loaded 20,163 barrels of crude petroleum, 29,903 barrels of fuel oil and 25,328 barrels of diesel oil at Los Angeles, California, destined for discharge at various ports in Chile (S. A.).

Fifth: On or prior to October 23, 1940, the crew of the T/S Montebello signed ship's articles for a voyage to Iquique, Valparaiso and Antofagasta, Chile, and return to a Pacific Coast United States port.

Sixth: On October 23, 1940, T/S Montebello cleared from the Port of Los Angeles to the Port of Iquique, Chile.

Seventh: On November 12, 1940, said T/S Montebello discharged 11,241 barrels of fuel oil at Iquique, Chile, and cleared for Valparaiso, Chile.

Eighth: On November 17, 1940, said vessel discharged 19,905 barrels of crude oil at Valparaiso, Chile; said vessel thereupon cleared for Antofagasta, Chile, and upon arrival there discharged her remaining cargo.

Ninth: Upon completion of discharge at Antofagasta, [37] said T/S Montebello proceeded in ballast to Talara, Peru, where she loaded 76,984 barrels of crude petroleum on November 27, 1940, and thereupon cleared for Vancouver, British Columbia.

Tenth: Said T/S Montebello proceeded from Talara to Vancouver and upon arrival in that port she discharged her entire cargo on December 17, 1940.

Eleventh: The Montebello proceeded in Ballast from Vancouver to Port San Luis, California, after she had discharged her entire cargo at Vancouver, arriving in San Luis on December 24, 1940.

Twelfth: Upon arrival at San Luis, M. Andreasen, the Montebello's Master, entered the vessel at the Custom House and filed the "Master's Oath on Entry of Vessel from Foreign Port," a certified copy of which is hereto annexed, marked Exhibit "A" and made a part hereof, only after refusal of the Deputy Collector of Customs at the Port of San Luis to accept a Master's Oath on said Form 3251 which showed the Montebello as arriving from Vancouver, Canada, said Deputy Collector of Customs at the Port of San Luis refusing to accept the same and requiring that the oath show the vessel as arriving from Talara, Peru.

Thirteenth: Upon the Montebello's entry and the filing of the aforementioned affidavit, the defendant demanded and collected from the plaintiff tonnage duty at the rate of six (6) cents per ton in the total sum of Three Hundred Six and Forty-two One-Hundredths Dollars (\$306.42), which said payment is evidenced by tonnage tax certificate Number 440664, appended to the Master's affidavit, Exhibit "A" herein, which said certificate is marked "Exhibit B" and made a part hereof.

Fourteenth: After the Montebello entered as aforesaid, her crew was paid off and discharged before a United States Shipping Commissioner. [38]

Fifteenth: After entering as aforesaid, the *M/S* Montebello surrendered her certificate of registry, giving as a reason therefor that her trade had been changed from foreign to coastwise and was issued a certificate of en-

rollment and license entitling her to engage in the coast-wise trade.

Sixteenth: On May 7, 1941, plaintiff applied to the Director of the Bureau of Marine Inspection and Navigation, hereinafter referred to as the Director, for a refund of Two Hundred Four and Twenty-eight One-Hundredths Dollars (\$204.28), representing the difference between the amount of the tonnage tax computed at the six (6) cent rate and the amount computed at the two (2) cent rate, which plaintiff deemed applicable. Said application was made by verified letter dated May 7, 1941, hereunto annexed, marked Exhibit "C" and made a part hereof, which was delivered to defendant for transmittal. Defendant procured a report of the facts relative to the imposition and collection of aforesaid tonnage tax from the Deputy Collector in Charge, E. P. James, which said report is hereunto annexed, marked Exhibit "D" and made a part hereof. The defendant hereupon transmitted the application for refund (Exhibit "C"), together with report of the Deputy Collector (Exhibit D), to the Director by letter dated May 14, 1941, hereunto annexed and marked Exhibit "E" and made a part hereof.

Seventeenth: As appears by the affidavit of Richard S. Field, Director, dated December 4, 1941, any party in interest to a matter involving payment of tonnage taxes may obtain, upon request, an opportunity to appear and be heard either before the Director or one of his qualified assistants. A copy of the aforesaid affidavit is hereunto annexed, marked Exhibit "F" and made a part hereof.

However, neither the Customs brokers who entered vessels nor the owners of the vessels were ever advised that an oral hearing could be had. [39]

Eighteenth: On or about May 31, 1941, the Director after deliberation found and decided that the tonnage taxes assessed upon the entry of the Montebello, December 24, 1940, were correctly assessed and denied the application for a refund.

The Director's opinion and decision is contained in a letter to the defendant dated May 21, 1941, copy of which is hereunto annexed, marked Exhibit "G" and made a part hereof. Plaintiff was duly notified of the aforesaid decision.

Nineteenth: On January 25, 1939, the Director decided on application for refund of tonnage taxes against the M/S Ontariolite, a copy of which decision is contained in a letter to the Deputy Collector of Customs in Charge at San Pedro, dated January 25, 1939, a copy of which is hereunto annexed, marked Exhibit "H" and made a part hereof.

Twentieth: On February 24, 1938, the Director decided an application for a refund of tonnage taxes against the Rotterdam, a copy of which decision is contained in a letter to the Deputy Collector of Customs in Charge at San Pedro, dated February 24, 1938, a copy of which is hereunto annexed, marked Exhibit "I" and made a part hereof.

“Twenty-first: Panamanian steamship Santa Maria entered the Port of San Francisco, California, on September 9 and September 20, 1940. The Master filed a ‘Master’s Oath on Entry, stating that the vessel entered from Vancouver, B. C., on the basis of which tonnage tax was assessed and collected at the rate of 2 cents per ton. The vessel had in fact completed a voyage similar to the voyage of the Montebello above described. This fact was unknown to the defendant, although it may have been known to the clerk in defendant’s office who actually assessed and collected the tax.’ [40]

WALTER I. CARPENETI

Attorney for Plaintiff, Union Oil Company of California

CHARLES H. CARR

United States Attorney, Attorney for Defendant, William Jennings Bryan, Jr., individually and as Collector of Customs for the Port of Los Angeles, Customs Collection District No. 27

JAMES L. CRAWFORD

Assistant United States Attorney

Attorneys for defendant, William Jennings Bryan, Jr.

Los Angeles, California

September 17, 1943

[Endorsed]: Filed Sep. 17, 1943. [41]

[Title of District Court and Cause.]

OPINION

Walter I. Carpeneti, Esquire, of San Francisco, California, representing the Plaintiff.

Charles H. Carr, United States Attorney, John M. Gault, Assistant United States Attorney, and James L. Crawford, Assistant United States Attorney, representing the Defendant.

O'Connor, J. F. T., Judge.

This is an action to recover tonnage taxes assessed and paid upon the plaintiff's vessel, American tank steamer. Montebello, pursuant to 46 U. S. C. sec. 121.

Three questions are presented to the court for determination: (1) Has this court jurisdiction of a controversy involving the assessment and collection of tonnage taxes? (2) Were the tonnage taxes properly assessed? (3) Can the Collector of Customs be sued to recover a tonnage tax, if such tax is found to be illegally collected?

Under the first contention only two decisions, both written fifty-three years ago, (North German Lloyd Steam- [42] ship Co. vs. Hedden, 43 Fed 17—May 21, 1890—Circuit Court for the District of New Jersey; and Laidlaw vs. Abraham, 43 Fed. 297—August 18, 1890—Circuit Court for the District of Oregon) have passed upon the question.

The parties have filed extensive and carefully prepared briefs. The final decision of the courts will affect the tonnage tax, and therefore the commerce flowing into our ports. The facts are stipulated. The application of those facts to the law is the court's problem.

The plaintiff, Union Oil Company of California "now is and at all material times was the owner and operator of the American Tank Steamer Montebello, an ocean-going vessel of 5,107 net tons . . ." On October 23, 1940, the Montebello was loaded with a cargo of crude petroleum, oil fuel and diesel oil at Los Angeles, California, destined for discharge at various ports in Chile, South America. The crew of said vessel signed ship's articles for a voyage to Iquique, Valparaiso, and Antofagasto, Chile, and return to a Pacific Coast United States Port. On various dates after October 23, 1940, when the tank steamer, Montebello, cleared from Port of Los Angeles, its cargo was discharged at the respective ports designated on different dates until it cleared for Antofagasto. Upon completion of discharge at the last named port, the Montebello proceeded in ballast to Talard, Peru, where she loaded a cargo of crude petroleum, and thereupon cleared for Vancouver, British Columbia. Upon arrival in that port, she discharged her entire cargo. The Montebello then proceeded in ballast from Vancouver, B. C. to Port San Luis, California, arriving December 24, 1940. Upon arrival at San Luis, the Master of the vessel tendered to the Deputy Collector of Customs a Master's Oath on form No. 3251, showing the Montebello as arriving from Vancouver, [43] Canada. The Collector refused to accept the Master's Oath and demanded an Oath showing the vessel arrived from Talaro, Peru, which was furnished, and then the Collector demanded and collected from plaintiff tonnage duty at the rate of six (6) cents per ton in the total sum of three hundred six and forty-two one-hundredths dollars.

Following the entry of the Montebello, her crew were paid and discharged before a United States Shipping

Commissioner. The certificate of registry was surrendered owing to a change of trade from foreign to coast-wise operations. On May 7, 1941, the plaintiff applied to the Director of the Bureau of Marine Inspection and Navigation, hereinafter referred to as the Director, for refund of two hundred four and twenty-eight hundredths dollars, representing the difference between the amount of tonnage tax computed at the six (6) percent rate and the amount computed at two (2) percent, which the plaintiff deemed applicable. It appeared by affidavit that any party in interest to a matter involving the payment of tonnage taxes may obtain, upon request, an opportunity to appear and be heard either before the Director or one of his qualified assistants. Neither the Customs brokers, who entered vessels, nor the owners of the vessels, were ever advised that an oral hearing could be had. On May 31, 1941 the Director decided that the tonnage tax was correctly assessed upon entry of the Montebello, on December 24, 1940. The application for refund was denied.

The statute provides:

“The Commissioner of Navigation shall be charged with the supervision of the laws relating to the ad-measurement of vessels, and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of [44] such tax when collected erroneously or illegally, his decision shall be final.”

Act, July 5, 1884. 46 U. S. C. A. 3., 23 Stat. 119.

Prior to the enactment of the Act of July 5, 1884, an appeal could be taken to the Secretary of the Treasury

for a refund of tonnage tax, (Act of June 30, 1864) and to the Department of State upon the interpretation of treaties involving the collection of said tax. The Act of July 5, 1884 was a reorganization measure. See statement, Representative Dingley, 15 Congressional Record, Part 4. This Act ended administration confusion and made the decision of the Commissioner of Navigation final, thus terminating appeals to the Secretary of the Treasury, the Secretary of State, or any other administrative head. There was no intention on the part of Congress to deprive the courts of jurisdiction.

“By the Act of June 30, 1932, Chapter 314, Section 501 (47 Stat. 415), (5 U. S. C., Section 597a), the Bureau of Navigation was consolidated with the Steamboat Inspection Service into the Bureau of Navigation and Steamboat Inspection, under the Chief of the new bureau, who succeeded to the duties and powers of the Commissioner of Navigation under the 1884 Act quoted above. (46 U. S. C., Section 3). By the Act of May 27, 1936, Chapter 463, Section 1, 49 Stat. 1380, 5 U. S. C. A., Section 597a-1, the name of the bureau was changed to “Bureau of Marine Inspection and Navigation”. The Director of the renamed bureau was charged with the duties and powers of the former Commissioner of Navigation under the 1884 statute quoted above. (46 U. S. C. A., Supp. Section 1 note). . . .

“The functions of the Bureau of Marine Inspection and Navigation were transferred to the Bureau of Customs by Executive Order No. 9083, effective March 1, 1942, and published in (1942) 7 Fed. Reg. 1609, and the powers of the Bureau of Marine In-

spection and Navigation were vested in the Commissioner of Customs by the same order, which was an exercise of the statutory powers granted the President to reorganize the executive branch of the Government.)”

Going now directly to the question of jurisdiction, [45] we must examine carefully the Hedden and the Laidlaw opinions. The Hedden opinion clearly states that the question of jurisdiction was raised by the court *sua sponte*. The Court said:

“ . . . on the other hand, the labor and responsibility of the court have been increased by the omission of defendant’s counsel to furnish any assistance towards the solution of the questions and permitting them to pass *sub silentio*.”

It is reasonable to conclude that the government assumed the court had jurisdiction. The Attorney General, five years prior to the Hedden decision, (June 12, 1885—18 Op. Atty. Gen. 197) held that the Act in question was designed to terminate the right of appellate review formerly existing in the Secretary of the Treasury and the Secretary of State. The tonnage tax and the power of the Commissioner of Navigation were directly at issue in the Hedden case, and the court held that:

“Congress has seen fit to constitute him the final arbiter in certain disputes and Congress, alone, can supply a remedy for any wrong which may have arisen from his construction of the law relating to the collection of tonnage due.”

The court further held Congress had the authority under the court to vest in the Commissioner the power to make final decisions.

Three months after the Hedden decision the Circuit Court for the District of Oregon rendered its opinion in *re Laidlaw vs. Abraham*, 43 Fed. 297. The plaintiff claimed the wrongful collection of a tonnage tax and instituted suit. The court at first decided against the plaintiff and held in *re Laidlaw*, 42 Fed. 401, decided May 13, 1890:

“. . . the decision of the Commissioner of the Navigation seems to be final.”

However, [46] about three months thereafter the same court reversed its own opinion in *re Laidlaw vs. Abraham*, 43 Fed. 297, which was decided August 18, 1890. The question of jurisdiction was directly raised. The defendant filed a general demurrer to the complaint, urging that the facts did not state a cause of action and the court is without jurisdiction. Judge Deady said:

“The only other point made in support of the demurrer is that the decision on the appeal to the secretary was, under the Act of July 5, 1884, (23 St. 118,) in fact made by the commissioner of navigation, and is by said act made final, and is therefore a bar to this action.

This act is entitled “‘An act to constitute a bureau of navigation in the treasury department.’” The commissioner created by it is charged, “‘under the direction of the secretary of the treasury’” with many duties concerning “‘the commercial, marine, and merchant seamen of the United States;’” and,

by section 3 thereof, "with the supervision of the laws relating to the admeasurement of vessels and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final.' "

At first blush it may appear that this provision in the act of 1884 repealed so much of sections 2931, 3011, Rev. St., as gives the person paying such illegal tax the right of redress in the courts, after an unsuccessful appeal to the department. But, on reflection, I am satisfied that the word " 'final' " is used in this connection with reference to the department, of which the commissioner is generally a subordinate part.

In my judgment, the purpose of the provision is to relieve the head of the department from the labor of reviewing the action of the commissioner in these matters, to sidetrack into the bureau of navigation the business of rating vessels for tonnage duties, and deciding questions arising on appeals from the execution of the same by collectors. The appeal is still taken to the secretary of the treasury, as provided in section 2931, but goes to the commissioner for decision, whose action is " 'final' " in the department, as it would not be but for this provision of the statute.

This being so, and nothing appearing to the contrary, it follows that the right of action given to the unsuccessful appellant in such cases is not taken away. The appeal to the department has simply been

decided by the commissioner, rather than the secretary, and, that having been adverse to the plaintiff, his right of action against the collector attaches at once." [47]

Several considerations lead this court to follow the Laidlaw opinion rather than the Hedden opinion.

(1) No appeal was taken by the government, thus creating a strong inference that the government acquiesced in the decision. (2) The court handed down an opinion and after more careful consideration reversed itself. (3) The usual rule is to follow the later decision where two precedents of equal standing are at variance and irreconcilable. (4) The Attorney General of the United States, in advising the President on his power to reverse a decision of the Commissioner, referred to the Laidlaw case and to the right of the aggrieved party to bring an action in the courts. 20 Op. Atty. Gen. 367, March 23rd, 1892.

Harper vs. Charlesworth, 4 Barn & C 589; Allen's Estate, 109 Pa. 489; 1 Atl. 82; Chicago Ry Co. vs. Van Cleave 52 Kan. 665; 33 Pac. 472.

Congress has conferred jurisdiction on district courts to hear and determine the question at issue in this case. Judicial Code, sec. 24, as amended. Sec. 41, Title 28—sub. sec. 5, as amended, March 3, 1911, reads as follows:

"Cases under internal revenue, customs and tonnage laws. Fifth. Of all cases arising under any law providing for internal revenue, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction

of which has been conferred upon the Court of Customs and Patent Appeals. Mar. 3, 1911, c. 231, sec. 24, par. 5, 36 Stat. 1092; Mar. 2, 1929, c. 488, sec. 1, 45 Stat. 1475”

The term “revenue law” when used in connection with the jurisdiction of the courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to Congress by Sec. 8, Art. I, of the Constitution, ‘to lay and collect taxes, [48] duties, imports and excises. *United States vs. Hill*, 123 U. S. 681. A mere expression of finality of decision by the Commissioner of Navigation does not necessarily imply a limitation upon the jurisdiction of the court. “The law is established that when a person, by the compulsion of the color of legal process, or of seizure of his person or goods, pays money unlawfully demanded, he may recover it back.” *Arkansas Building Association vs. Madden*, 175 U. S. 269.

“The words ‘Commissioner of Navigation’ should read ‘Director of the Bureau of Marine Inspection and Navigation’. ‘June 30, 1932, c. 314, sec. 501, 47 Stat. 415; May 27, 1936, c. 463, sec. 1, 49 Stat. 1380, should be added to this citation.”

46 U. S. C. A. 3

Were the tonnage taxes properly assessed?

The provisions of law under which the taxes were assessed are as follows:

“A tonnage duty of 2 cents per ton, not to exceed in the aggregate 10 cents per ton in any one year, is imposed at each entry on all vessels which shall

be entered in any port of the United States from any foreign port or place in North America, Central America. . . . and a duty of 6 cents per ton, not to exceed 30 cents per ton per annum, is imposed at each entry on all vessels which shall be entered in any port of the United States from any other foreign port, not, however, to include vessels in distress or not engaged in trade.”

46 U. S. C. A. 121.

Determination of the port from which the *Montebello* originated for the purpose of the tax involved is a question of fact. The defendant has failed to plead or prove, nor was there any showing of, deliberate evasion of the higher tax of 6 cents by the *Montebello*, in directing that part of its voyage from Talara, Peru, via Vancouver, B. C. to the Port of San Luis. The facts favor the position of the plaintiff. Clearing for Vancouver from Peru with a load of crude petroleum was no idle act. Application of the last port and continuous voyage doctrine is flexible and must be confined to the pecu- [49] liar facts submitted. No advantage of the 2 cent rate could be gained by simply touching a foreign North American port prior to entering a port of the United States. The conditions under which the *Montebello's* Master was required to file the “Master’s Oath on Entry of Vessel from Foreign Port”, can lend little weight to defendant’s position. The Collector arbitrarily determined the foreign port from which the vessel arrived as Talara, Peru, and refused to accept the Master’s Oath on the form which showed the *Montebello* as arriving from Vancouver, Canada.

The Deputy Collector in charge at Port San Luis, California, in his report to the Collector of Customs at Los Angeles, California, stated among other facts:

“Upon arriving and discharging cargo only at Vancouver, B. C., on December 17, 1940, the vessel sailed the same day in ballast for Port San Luis, Calif., arriving here December 24, 1940, where, after entry, the crew was paid off, crew purchases entered, the Document changed from Register to Enrollment, the voyage officially ended and the vessel engaged in coastwise trade.”

No argument is needed to prove that if a vessel incidentally is at a foreign intermediate port to secure ship supplies it cannot be said to have entered such a port, but in the instant case the vessel entered, discharged its cargo and cleared from Vancouver, B. C. It entered the United States port of San Luis from Vancouver, B. C. See Treasury Decision No. 11949 and 10379. The Attorney General ruled that where a vessel discharged all of its cargo at Guantanamo, Cuba, and then proceeded to the United States it was to be considered as coming from Guantanamo. See also: *The African Prince*, (D. C. Mass. 1914), 212 Fed. 552. A vessel enters the United States from that foreign port from which she last cleared. [50]

The same rule applies whether the vessel enters from a foreign port in ballast or with freight loaded at the foreign port. 25 Op. Atty. Gen. 157.

Where the Collector of Customs refuses to accept the Master's Oath designating the foreign port of entry and demands an Oath designating another port, the Master has little choice but to comply lest he place himself in

jeopardy and his vessel subject to forfeiture. Any Master would yield to an illegal demand rather than take such a risk.

"In this case", the defendant urges in its brief, "the Master's Oath on entry contained the statement that the voyage began at Talara, Peru". In a similar instance the Supreme Court was not impressed by an admission under compulsion. Justice Brown said:

"We are not impressed by the argument that, if the plaintiffs insisted that these sugars were not imported merchandise, they should have stood upon their rights, refused to enter the goods, and brought an action of replevin to recover their possession. It is true that, to prevent the seizure of the sugars, plaintiffs did enter them as imported merchandise; but any admission derivable from that fact is explained by their protest against the exaction of duties upon them as such. They waived nothing by taking this course. The collector lost nothing, since he was surprised of the course they would probably take."

DeLima vs. Bidwell, 182 U. S. at 179

The third question must be answered in the affirmative. The action against the Collector of Customs is proper. The Ninth Circuit in *re Border Line Transportation Co. vs. Haas, Collector of Customs*, 128 Fed. (2) 192, decided May 18, 1942, was an action against a Collector of Customs to recover certain entrance and clearance fees. The Circuit Court for this District has several times stated that it is the duty of the court to first determine the question of [51] jurisdiction in each case and if the same is lacking, to dismiss the action. "It is the duty of a federal court to determine a question of its jurisdiction sua

sponte though not raised by either party." 20 Fed. Dig. 725, and cases cited. The question of jurisdiction was not raised either by the court or the parties in *re* Border Line Transportation Co., *supra*, and the same was taken for granted.

See also: 5 Stat. A. L. 727, c. 26: 17 Corpus Juris 642; *Cosulich Line of Trieste vs. Elting*, 40 Fed. (2) 220;

The defendant emphasizes the holding of the court in *Cary vs. Curtis*, 3 Howard 236; 44 U. S. 235, (decided in January term, 1845) and makes the following comment:

“. . . that since the passage of the Act of Congress of March 3, 1839, Chapter 82, Section 2, which required collectors of customs to ‘place to the credit of the Treasurer of the United States all money which they receive . . . for duties paid under protest,’ an action of assumpsit for money had and received will not lie against the collector for the return of such duties so received by him.”

The defendant also cites *Arnson vs. Murphy*, 109 U. S. 238 and 115 U. S. 579. However, fifty-six years after the decision in the *Cary* case, *supra*, the Supreme Court in *DeLima vs. Bidwell*, 182 U. S. 1 (1901) again considered the question. The arguments and the opinion cover 220 pages. The court speaking through Mr. Justice Brown, said:

“It was held by a majority of this court in *Cary v. Curtis*, 3 How. 236, that this act precluded an action of assumpsit for money had and received against the collector for duties received by him, and that the act of 1839 furnished the sole remedy. It was said

of that case in *Arnson v. Murphy*, 109 U. S. 238, 240: 'Congress, being in session at the time that the decision was announced, passed the explanatory act of February 26, 1845, which, by legislative construction of the act of 1839, restored to the claimant his right of action against the collector, but required the protest to be made in writing at the time of payment of the duties alleged [52] to have been illegally exacted, and took from the Secretary of the Treasury the authority to refund conferred by the act of 1839. 5 Stat. 349, 727. This act of 1845 was in force, as was decided in *Barney v. Watson*, 92 U. S. 449, until repealed by implication by the act of June 30, 1864,' c. 171, 13 Stat. 202, 214, carried into the Revised Statutes as sections 2931 and 3011. In the same case of *Arnson v. Murphy*, 109 U. S. 238, it was decided that the common-law right of action against the collector to recover back duties illegally collected was taken away by statute, and a remedy given, based upon these sections, which was exclusive. The decision in *Elliott v. Swartwout* was recognized, but so far as respected customs cases (i.e., classification cases) was held to be superseded by the statutes. So in *Schoenfeld v. Hendricks*, 152 U. S. 691, it was held that an action could not be maintained against the collector, either at common law or under the statutes, to recover duties alleged to have been exacted, in 1892, upon an importation of merchandise, the remedy given through the Board of General Appraisers being exclusive.

The criticism to be made upon the applicability of these cases is, that they dealt only with imported merchandise and with the duties collected thereon,

and have no reference whatever to exactions made by a collector, under color of the revenue laws, upon goods which have never been imported at all. With respect to these the collector stands as if, under color of his office, he has seized a ship or its equipment, or any other article not comprehended within the scope of the tariff laws. Had the sugars involved in this case been admittedly imported, that is brought into New York from a confessedly foreign country, and the question had arisen whether they were dutiable, or belonged to the free list, the case would have fallen within the Customs Administrative Act, since it would have turned upon a question of classification.

The fact that the collector may have deposited the money in the Treasury is no bar to a judgment against him, since Rev. Stat. sec. 989 provides that, in case of a recovery of any money exacted by him and paid into the Treasury, if the court certifies that there was probable cause for the act done, no execution shall issue against him, but the amount of the judgment shall be paid out of the proper appropriation from the Treasury." [53]

Judgment for the plaintiff as prayed for in the complaint. Plaintiff will prepare Findings of Fact and Judgment in accordance with this opinion.

Dated October 13, 1943.

J. F. T. O'CONNOR

J. F. T. O'Connor

United States District Judge

[Endorsed]: Filed Oct. 14, 1943. [54]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This cause having been submitted upon stipulation of facts and upon written briefs, the plaintiff being represented by Walter I. Carpeneti, Esquire, and the defendant being represented by Charles H. Carr, United States Attorney, John M. Gault and James L. Crawford, Assistant United States Attorneys; and the court having announced its decision in favor of the plaintiff on October 13, 1943, the court now files its written Findings of Fact and Conclusions of Law as follows: [55]

I.

The court finds that this is a suit at law of a civil nature arising under the Constitution and the laws of the United States providing for the collection of a tonnage duty or tax, as is hereafter more fully set forth, and is a case of actual controversy between the plaintiff and the defendant involving the validity, force and effect of a law of the Congress of the United States of America under the Constitution of the United States of America.

II.

The court finds that plaintiff, Union Oil Company of California, is a corporation existing under the laws of the State of California, with its principal place of business in Los Angeles, California, and was incorporated in 1890, for the purpose of exploring, mining, extracting, producing, refining, selling, importing, exporting, distributing and transporting, by land and sea, petroleum, oil hydrocarbon substance and their by-products and derivatives.

III.

The court finds that defendant, William Jennings Bryan, Jr., a citizen of the State of California, resident in the City and County of Los Angeles, California, is, and at all material times was, duly appointed and qualified as Collector of Customs for the Port of Los Angeles, Customs Collection District No. 27, including the Port of San Luis, California, and among the duties of said defendant as such Collector of Customs under the laws of the United States was, and is, the supervision and the exercise of authority and control over the entrance and clearance of vessels arriving at the Port of San Luis from foreign ports; and the exaction and collection of entrance and clearance fees and the collection of tonnage duty or tax on vessels arriving at said Port of San Luis from foreign countries [56]

IV.

The court finds that plaintiff now is and at all material times was the owner and operator of the American Tank Steamer Montebello, an ocean-going vessel of 5,107 net tons, which at all material times was owned and operated by plaintiff and employed by plaintiff in transporting plaintiff's property.

V.

The court finds that on or about October 23, 1940, said T/S Montebello loaded 20,163 barrels of crude petroleum, 29,903 barrels of fuel oil and 25,328 barrels of diesel oil at Los Angeles, California, destined for discharge at various ports in Chile (S. A.).

VI.

The court finds that on or prior to October 23, 1940, the crew of the T/S Montebello signed ship's articles for a voyage to Iquique, Valparaiso and Antofagasta, Chile, and return to a Pacific Coast United States port.

VII.

The court finds that on October 23, 1940, the T/S Montebello cleared from the Port of Los Angeles to the Port of Iquique, Chile.

VIII.

The court finds that on November 12, 1940, said T/S Montebello discharged 11,241 barrels of fuel oil at Iquique, Chile, and cleared for Valparaiso, Chile.

IX.

The court finds that on November 17, 1940, said vessel discharged 19,905 barrels of crude oil at Valparaiso, Chile; said vessel thereupon cleared for Antofagasta, Chile, and upon arrival there discharged her remaining cargo.

X.

The court finds that upon completion of discharge at Antofagasta, the said T/S Montebello proceeded in ballast to Talara, Peru, where she loaded 76,984 barrels of crude petroleum on November 27, 1940, and thereupon cleared for Vancouver, British Columbia. [57]

XI.

The court finds that said T/S Montebello proceeded from Talara to Vancouver and upon her arrival in that port she discharged her entire cargo on December 17, 1940.

XII.

The court finds that the Montebello proceeded in ballast from Vancouver to Port San Luis, California, after she had discharged her entire cargo at Vancouver, arriving in San Luis on December 24, 1940.

XIII.

The court finds that upon arrival at San Luis, M. Andreasen, the Montebello's Master, entered the vessel at the Custom House and filed the "Master's Oath on Entry of Vessel from Foreign Port," only after refusal of the Deputy Collector of Customs at the Port of San Luis to accept a Master's Oath on said Form 3251, which showed the Montebello as arriving from Vancouver, Canada, said Deputy Collector of Customs at the Port of San Luis refusing to accept the same and requiring that the oath show the vessel as arriving from Talara, Peru.

XIV.

The court finds that upon the Montebello's entry and the filing of the aforementioned affidavit, the defendant demanded and collected from plaintiff tonnage duty at the rate of six (6) cents per ton in the total sum of Three Hundred Six and Forty-two One Hundredths Dollars (\$306.42), which said payment is evidenced by tonnage tax certificate Number 440664, appended to the Master's affidavit.

XV.

The court finds that after the Montebello entered as aforesaid, her crew was paid off and discharged before a United States Shipping Commissioner.

XVI.

The court finds that after entering as aforesaid, the T/S Montebello surrendered her certificate of registry, giving as a [58] reason therefor that her trade had been changed from foreign to coastwise and was issued a certificate of enrollment and license entitling her to engage in the coastwise trade.

XVII.

The court finds that on May 7, 1941, plaintiff applied to the Director of the Bureau of Marine Inspection and Navigation, hereinafter referred to as the Director, for a refund of Two Hundred Four and Twenty-eight One Hundredths Dollars (\$204.28), representing the difference between the amount of the tonnage tax computed at the six (6) cent rate and the amount computed at the two (2) cent rate, which plaintiff deemed applicable. Said application was made by verified letter dated May 7, 1941, which was delivered to defendant for transmittal. Defendant procured a report of the facts relative to the imposition and collection of the aforesaid tonnage tax from the Deputy Collector in Charge, E. P. James. The defendant thereupon transmitted the application for refund, together with the report of the Deputy Collector, to the Director by letter dated May 14, 1941.

XVIII.

The court finds that it appears by the affidavit of Richard S. Field, Director, dated December 4, 1941, any party in interest to a matter involving payment of tonnage taxes may obtain, upon request, an opportunity to appear and be heard either before the Director, or one of his qualified assistants. However, neither the Customs brokers who entered vessels nor the owners of the vessels were ever advised that an oral hearing could be had.

XIX.

The court finds that on or about May 31, 1941, the Director after deliberation found and decided that the ton-

nage taxes assessed upon the entry of the Montebello, December 24, 1940, were correctly assessed and denied the application for a refund. The director's opinion and decision is contained in a letter to the defendant dated May 21, 1941. Plaintiff was duly notified of [59] the aforesaid decision.

XX.

The court finds that on January 25, 1939, the Director decided an application for refund of tonnage taxes on the basis of two (2) cents per ton in favor of the M/S Ontariolite, a copy of which decision is contained in a letter to the Deputy Collector of Customs in Charge at San Pedro, dated January 25, 1939.

XXI.

The court finds that on February 24, 1938, the Director decided an application for a refund of tonnage taxes on the basis of two (2) cents per ton in favor of the Rotterdam, a copy of which decision is contained in a letter to the Deputy Collector of Customs in Charge at San Pedro, dated February 24, 1938.

XXII.

The court finds that on or about May 31, 1941, the Director distinguished between the Ontariolite, Rotterdam, and Montebello voyages and found and decided that the tonnage taxes assessed upon the entry of the Montebello, December 24, 1940, on the basis of six (6) cents per ton, were correctly assessed and denied the application for a refund, a copy of which decision is contained in a letter to the appellee-defendant, dated May 21, 1941. Plaintiff was duly notified of the aforesaid decision.

XXIII.

The court finds that the Panamanian steamship Santa Maria entered the Port of San Francisco, California, on September 9 and September 20, 1940. The Master filed a "Master's Oath on Entry" stating that the vessel entered from Vancouver, B. C., on the basis of which tonnage tax was assessed and collected at the rate of two (2) cents per ton. The vessel had in fact completed a voyage similar to the voyage of the Montebello, above described. This fact was unknown to the defendant, although it may have been known to the clerk in defendant's office, who actually assessed and collected the tax. [60]

XXIV.

The court finds that the demand and collection of said tonnage duty or tax in excess of two (2) cents per ton from the plaintiff was and is illegal, arbitrary, oppressive and deprives plaintiff of his property without due process of law.

Conclusions of Law.

From the foregoing facts, the court makes the following Conclusions of Law:

I.

That this is a cause of action within the jurisdiction of the District Courts of the United States.

II.

That a vessel arriving in ballast at a port of entry in the United States from a port in British Columbia, where said vessel had entered and discharged fully its cargo theretofore loaded at a foreign port for discharge of said

port in British Columbia, is subject to the payment of tonnage duty or tax at the rate of two (2) cents a ton under the provisions of Section 121 of Title 46 of the United States Code.

III.

That the requirement that said vessel pay tonnage duties at the rate of six (6) cents per ton was and is contrary to law.

IV.

That said vessel was entitled to pay tonnage duties at the rate of two (2) cents per ton.

V.

That plaintiff is entitled to judgment in the sum of Two Hundred Four Dollars and Twenty-eight Cents (\$204.28), together with interest from date of exaction, and costs of suit.

Dated: This 7 day of August, 1944.

J. F. T. O'Connor
United States District Judge

Approved as to form as provided in Rule 7: [61]

CHARLES H. CARR
United States Attorney
By Mildred L. Kluckhohn
MILDRED L. KLUCKHOHN
Assistant U. S. Attorney.

[Endorsed]: Filed Aug. 7, 1944. [62]

In the District Court of the United States in and for the
Southern District of California Central Division

No. 1749-O'C Civil.

UNION OIL COMPANY OF CALIFORNIA, a cor-
poration,

Plaintiff,

vs.

WILLIAM JENNINGS BRYAN, JR., individually and
as Collector of Customs for the Port of Los Angeles,
Customs Collection District No. 27,

Defendant.

FINAL DECREE

The above-entitled case came on regularly for pre-trial hearing on June 10, 1943, at 10 o'clock A. M., before the court, Walter I. Carpeneti, Esq., appearing for the plaintiff, and Charles H. Carr, United States Attorney, and James L. Crawford, Assistant United States Attorney, appearing for the defendant, and the case having been submitted on written stipulation of facts, and the Court having announced its decision, and separate Findings of Fact and Conclusions of Law, and Certificate of Probable Cause having been submitted to and signed and filed by the Court;

It Is Ordered, Adjudged and Decreed that the plaintiff take judgment in its action in the sum of Two Hundred Four and [63] 28/100 Dollars (\$204.28), with interest

from December 24, 1940, in the sum of Forty-four and 50/100 Dollars (\$44.50), together with costs of suit in the sum of \$26.50.

Dated: Los Angeles, California, August 16, 1944.

J. F. T. O'CONNOR
United States District Judge

Approved as to form as Provided in Rule 7:

CHARLES H. CARR
United States Attorney

By: Clyde C. Downing
Assistant U. S. Attorney

Judgment entered Aug. 16, 1944. Docketed Aug. 16, 1944 Book 27, page 248. Edmund L. Smith, Clerk; by Loius J. Somers, Deputy.

{Endorsed}: Filed Aug. 16, 1944. [64]

[Title of District Court and Cause.]

CERTIFICATE OF PROBABLE CAUSE

(R. S. 989; 28 U. S. Code 842)

It Appearing to the satisfaction of the court that the subject matter of the judgment rendered in favor of the plaintiff and against the defendant in the above entitled action is money exacted by, or paid to, the defendant and by him paid into the Treasury of the United States in the performance of his official duty as Collector of Customs;

The Court hereby certifies that there was probable cause for the acts of the defendant in collecting said money and paying the same into the Treasury and that said defendant acted under the directions of the Secretary of Commerce or other proper officer of the government in so doing.

Dated: this 16 day of August, 1944.

J. F. T. O'CONNOR

United States District Judge

Approved as to Form as Provided in Rule 7.

WALTER I. CARPENETI

Attorney for Plaintiff.

[Endorsed]: Filed Aug. 16, 1944. [65]

United States District Court Southern District of
California Central Division.

NOTICE BY CLERK OF ENTRY OF JUDGMENT

Walter I. Carpeneti, Esq.,

354 South Spring St.,

Los Angeles, California.

Chas. H. Carr, Esq.,

United States Attorney.

Clyde C. Downing, Asst.,

6th Floor,

U. S. Postoffice & Courthouse,

Los Angeles, Calif.

Gentlemen:

Re:

UNION OIL COMPANY OF CALIFORNIA, a corp.

v.

WILLIAM JENNINGS BRYAN JR., individually and
as Collector of Customs for the Port of Los Angeles.
Customs Collection District No. 27.

1749 O'C Civil

You are hereby notified that Judgment has been entered this day in the above-entitled case, in Civil Order Book No. 27, page 248.

Dated: Los Angeles, California. August 16th, 1944.

EDMUND L. SMITH,

Clerk

By Louis J. Somers

Louis J. Somers,

Deputy Clerk.

[Endorsed]: Filed Aug. 16, 1944. [66]

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND DISBURSEMENTS.

Disbursements

| | |
|--|---------|
| Marshal's Fees—Service of Summons | \$ 6.00 |
| Clerk's Fees Filing Fee for Complaint | 10.00 |
| Witness' Fees | |
| Affidavit to cover Cost Bill | .50 |
| Attorney's Docket Fees (Sec. 824 R. S.) (Sec. 571-2 Title 28 U. S. C.) | 10.00 |
| | <hr/> |
| | \$26.50 |
| | Taxed |

United States of America, Southern District of California, City and County of San Francisco—ss.

Walter I. Carpeneti, being duly sworn, deposes and says: That he is the Attorney for the Plaintiff in the above-entitled cause, and as such is better informed, relative to the above costs and disbursements, than the said Plaintiff. That the items in the above Memorandum contained are correct, to the best of this deponent's knowledge and belief, and that the services charged therein have been actually and necessarily performed and said disbursements have been necessarily incurred in the said cause.

WALTER I CARPENETI

Subscribed and sworn to before me, this 15th day of August A. D. 1944.

[Seal]

LOUIS WIENER,

Notary public in and for the City and County
of San Francisco, State of California.

My commission expires August 19, 1947. [67]

Service of the within memorandum of costs and disbursements, and receipt of a copy thereof acknowledged this 19 day of August, A. D. 1944, and defendant consents to immediate tax of above costs.

Chas. H. Carr
U .S. Attorney
Wm. W. Worthington
Asst. U. S. Attorney
Attorney for Defendant

[Endorsed]: Filed Aug. 19, 1944. [68]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT
OF APPEALS, NINTH CIRCUIT.

Notice is hereby given that William Jennings Bryan, Jr., individually and as Collector of Customs for the Port of Los Angeles, Customs Collection District No. 27, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Final Decree entered in this action on August 16, 1944.

Dated: September, 1944.

CHARLES H. CARR,
United States Attorney,

RONALD WALKER,
Assistant U. S. Attorney,

By: MILDRED L. KLUCKHOHN,
Assistant U. S. Attorney,

Attorneys for Defendant and Appellant.

[Endorsed]: Filed & mailed copy to Walter I. Carpeneti. atty. for plf. Oct. 12, 1944. [69]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED UPON
BY APPELLANT ON APPEAL

Pursuant to Rule 75 of the Federal Rules of Civil Procedure, the appellant herein states that the points upon which it intends to rely on appeal in the above-entitled action are as follows:

1. The Collector of Customs, acting in his official capacity as an officer of the Government, may not be sued in the District Court for the recovery of erroneously assessed tonnage duties. Such a suit is in reality one against the United States which may not be maintained unless the United States has consented [71] to be sued in such form. That consent is lacking.

2. The District Court lacks jurisdiction over a controversy involving the assessment, collection and refund of tonnage taxes. The decision of the Director of the Bureau of Marine Inspection and Navigation as to the correctness of the assessment by the Collector of Customs is final and not subject to judicial review.

3. The determination by the Collector of Customs, as affirmed by the Director of the Bureau of Marine Inspection and Navigation, that the Montebello entered from Talara, Peru, and not from Vancouver, B. C., being a question of fact, is not subject to judicial review. Even if reviewable by the courts, it should have been given great weight and not overturned unless clearly wrong and unsupported by the evidence.

4. The tonnage taxes were correctly assessed by the Collector of Customs. A vessel arriving in ballast at a port of entry in the United States from a port at British

Columbia where said vessel had entered and discharged fully its cargo theretofore loaded at a foreign port for discharge in said port in British Columbia is subject to the payment of tonnage duty or tax at the rate of six cents a ton and not at the rate of two cents a ton under the provisions of Section 121 of Title 46 U. S. C. A.

5. The requirement that said vessel pay tonnage duty at the rate of six cents per ton was in accordance with and not contrary to law.

6. Said vessel is not entitled to pay tonnage duty at the rate of two cents per ton.

7. That the District Court erred in holding that the plaintiff is entitled to judgment in the sum of \$204.28, together with interest from date of exaction and cost of suit.

8. And as further required by the said Rule and Section, [72] appellant designates as necessary for the consideration of the foregoing points the printing of the entire transcript.

Dated: This 4 day of November, 1944.

CHARLES H. CARR
United States Attorney

RONALD WALKER
Assistant United States Attorney

Wm. W. Worthington
WM. W. WORTHINGTON
Assistant United States Attorney

[Endorsed]: Filed Nov. 6, 1944. [73]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 75 inclusive contain full, true and correct copies of Bill of Complaint for Recovery of Tonnage Duty or Tax Illegally Exacted by the Collector of Customs; Defendant's Motion for Summary Judgment and Other Relief; Notice of Hearing on Motion for Summary Judgment; Order Denying Motion for Summary Judgment; Notice of Entry of Order Denying Motion for Summary Judgment; Notice of Substitution of Attorneys by Consent; Substitution of Attorney; Answer; Stipulation of Facts; Opinion; Findings of Fact and Conclusions of Law; Final Decree; Certificate of Probable Cause; Notice by Clerk of Entry of Judgment; Memorandum of Costs and Disbursements; Notice of Appeal; Affidavit of Service of Notice of Appeal; Statement of Points to be Relied Upon by Appellant on Appeal; and Designation of the Record of Proceedings and Evidence to be Contained in the Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court
this 21st day of November, 1944.

[Seal]

EDMUND L. SMITH,
Clerk

By Theodore Hocke
Theodore Hocke,
Chief Deputy Clerk.

[Endorsed]: No. 10931. United States Circuit Court
of Appeals for the Ninth Circuit. William Jennings
Bryan, Jr., Individually and as Collector of Customs for
the Port of Los Angeles, Customs Collection, District
No. 27, Appellant, vs. Union Oil Company of California,
a corporation, Appellee. Transcript of Record. Upon
Appeal from the District Court of the United States for
the Southern District of California, Central Division.

Filed November 24, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals for the
Ninth Circuit.

No. 10931

WM. JENNINGS BRYAN, JR., Collector of Customs,
Appellant,

v.

UNION OIL COMPANY OF CALIFORNIA, a cor-
poration,

Appellee.

STATEMENT OF POINTS TO BE RELIED UPON
BY APPELLANT ON APPEAL, AND DESIG-
NATION OF RECORD SUBMITTED FOR
CONSIDERATION ON APPEAL.

The United States of America, as appellant in the above-entitled matter, hereby incorporates by reference herein and adopts the statement of points on which appellant intends to rely and appellant's designation of record to be considered on appeal herein which was filed in the District Court of the United States, Southern District of California, Central Division, and which is now part of the record on appeal of said trial court in the above-entitled proceeding.

Dated: This 6 day of November, 1944.

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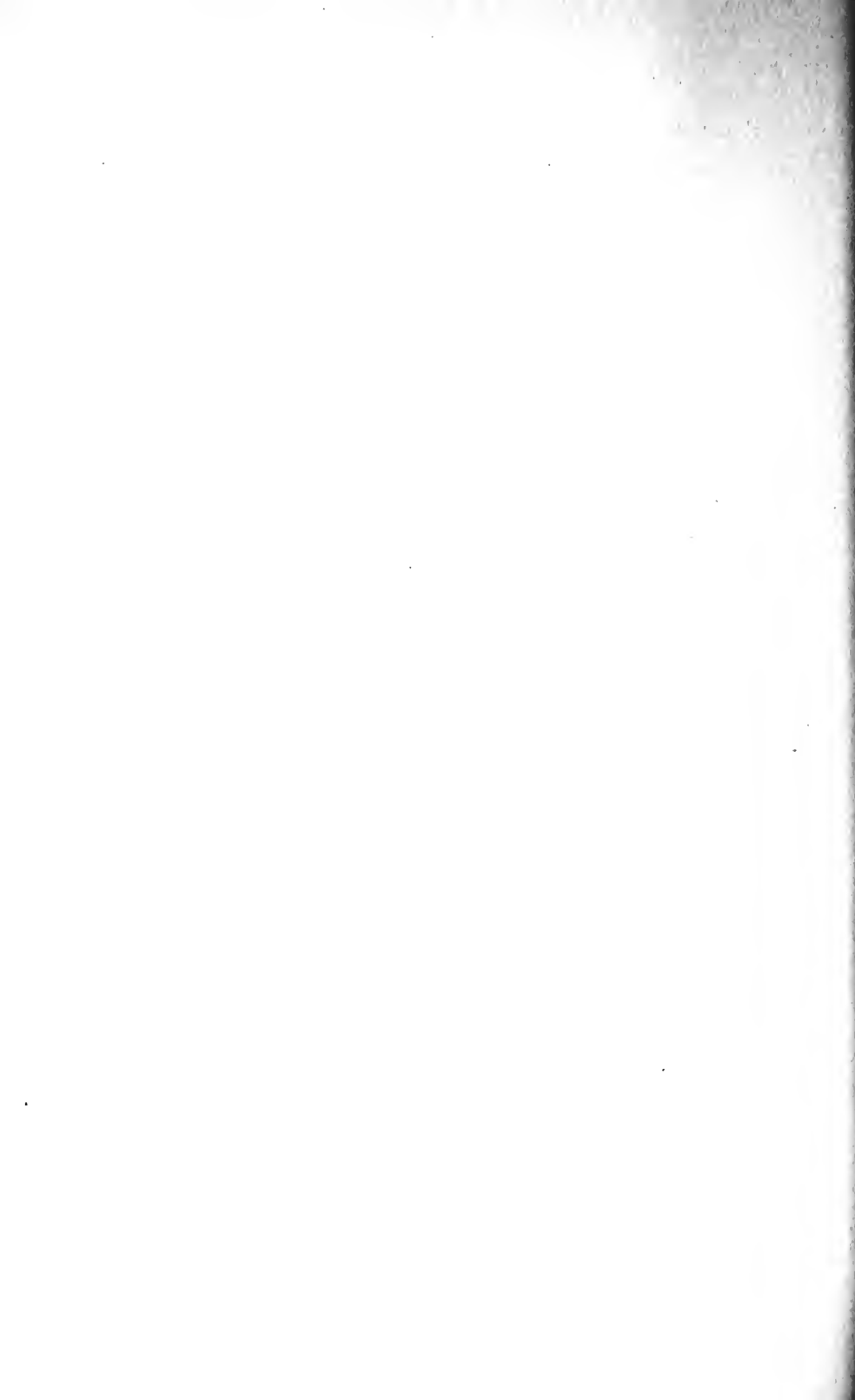
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Received copy of Statement of Points and Designation
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[Endorsed]: Filed Nov. 24, 1944. Paul P. O'Brien,
Clerk.



No. 10931

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

WILLIAM JENNINGS BRYAN, JR., INDIVIDUALLY AND AS COLLECTOR OF CUSTOMS FOR THE PORT OF LOS ANGELES, CUSTOMS COLLECTION, DISTRICT NO. 27, APPELLANT

v.

**UNION OIL COMPANY OF CALIFORNIA, A CORPORATION,
APPELLEE**

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION**

APPELLANT'S OPENING BRIEF

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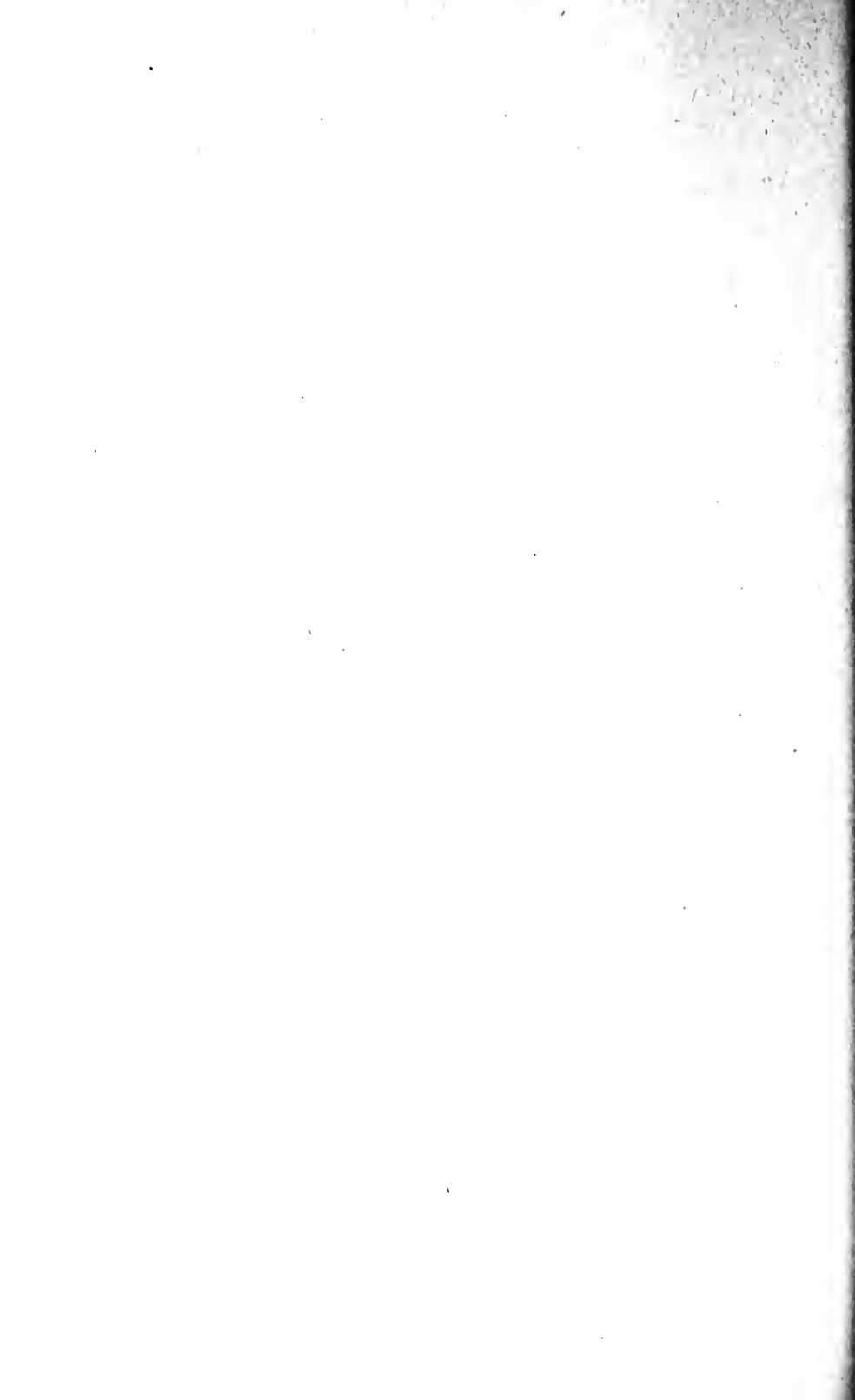
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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10931

WILLIAM JENNINGS BRYAN, JR., INDIVIDUALLY AND AS COLLECTOR OF CUSTOMS FOR THE PORT OF LOS ANGELES, CUSTOMS COLLECTION, DISTRICT NO. 27, APPELLANT

v.

UNION OIL COMPANY OF CALIFORNIA, A CORPORATION,
APPELLEE.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION

APPELLANT'S OPENING BRIEF

OPINION BELOW

The opinion of the United States District Court for the Southern District of California, Honorable J. F. T. O'Connor, District Judge, is reported at 52 F. Supp. 256, 1944 A. M. C. 829.

JURISDICTION

This is an appeal from a final judgment for the plaintiff entered by the United States District Court for the Southern District of California, Central Division, in a civil action by the Union Oil Company of California against William Jennings Bryan, Jr., individually and as Collector of Customs for the Port of Los Angeles, Customs Collection, District No. 27, to recover tonnage tax assessed and paid upon plaintiff's vessel the *S. S. Montebello*.

The judgment of the District Court was entered August 16, 1944 (R. 68). Notice of Appeal to this Court was filed October 12, 1944 (R. 73). The jurisdiction of this Court rests upon Section 128 (a) of the Judicial Code, as amended (28 U. S. C. 225 (a)). The complaint (R. 2-5) invoked the jurisdiction of the District Court under Section 24 (5), as amended (28 U. S. C. 41 (5)).

STATUTES AND REGULATIONS INVOLVED

The principal statutes and regulations involved are printed in the appendix, *infra*, p. 52.

QUESTIONS PRESENTED

Where a vessel was entered at Port San Luis, California, from a voyage beginning at Talara, Peru, and including Vancouver, B. C., with cargo from Talara to Vancouver and in ballast from Vancouver to Port San Luis, and tonnage tax at the rate applicable to voyages from Talara was paid without protest by plaintiff, who thereafter applied to the Director of the Bureau of Marine Inspection and Navigation for refund of the difference between the amount of tax thus paid and the amount computed at the lower rate applicable on voyages from Vancouver:

1. Whether or not the court has jurisdiction of an action against the collector individually for recovery of the amount which the Director refused to refund to plaintiff;
2. Whether or not, if the court has jurisdiction of an action against the collector, the decision of the Director on plaintiff's application for refund is final and conclusive upon the court as to the rate of tonnage tax applicable;
3. Whether or not, if the court is not concluded by the Director's decision, the rate applicable to voyages from Talara or that applicable to voyages from Vancouver should be applied.

STATEMENT OF THE CASE

The Pleadings.—Appellee Union Oil Company of California, hereinafter referred to as plaintiff, brought this civil action as owner of the American Tank Steamer *Montebello* against appellant William Jennings Bryan, Jr., hereinafter referred to

as the defendant or collector, to recover an alleged overpayment of tonnage duty or tax. The complaint (R. 2-5) alleges that on October 23, 1940, the vessel cleared Los Angeles for Iquique, Chile, with cargo for various ports in Chile, that after discharging she proceeded in ballast to Talara, Peru, where she loaded a cargo and cleared for Ioco, B. C.; that she discharged all cargo at Ioco and proceeded in ballast to Port San Luis, arriving December 24, 1940; that at Port San Luis defendant collected tonnage duty or tax at the rate of 6 cents per ton; that the vessel was lawfully entitled to pay tax at the rate of 2 cents per ton, and the collection in excess of 2 cents per ton "was and is illegal, arbitrary, oppressive, and deprives plaintiff of his property without due process of law." There was no allegation that payment was made under protest or that defendant retained possession or control of the amount collected. No mention was made of plaintiff's application for refund and its denial by the Director of the Bureau of Marine Inspection and Navigation.

A motion for summary judgment for defendant (R. 6) on the basis of the record before the Director (R. 7-29) was denied (R. 31) and defendant answered. The answer (R. 33-35) admits the basic allegations of fact but denies the conclusions that the vessel was entitled to pay tax at the 2-cent rate and that the collection at the 6-cent rate was illegal (Ans. I-V, R. 33-34). The answer further sets up as affirmative defenses that plaintiff appealed to the Director for refund, who after hearing denied the appeal, whereby the Court is concluded (Ans. VI-VII, R. 34) and that the crew was shipped for a voyage to Chilean ports and back to the Pacific Coast and was paid off after entry at Port San Luis, and the master's oath on entry certified the return voyage began at Talara (Ans. VIII-IX, R. 35).

The Facts.—The case was tried to the court without a jury on the pleadings and a stipulation of agreed facts (R. 39-44).¹ The district judge entered an opinion (R. 45) and later filed

¹ As the stipulation and the administrative record before the Director were substantially in accord defendant-appellant did not insist that the case be considered solely on the administrative record. See *infra*, note 29.

findings of fact and conclusions of law (R. 60-67) which may be quickly summarized.

About October 23, 1940, the *Montebello* loaded a mixed cargo of fuel oil, crude petroleum, and diesel oil for discharge at various ports in Chile, shipped a crew on articles for a voyage to Iquique, Valparaiso, and Antofagasta, Chile and return to a Pacific Coast United States port and cleared Los Angeles for Iquique, Chile. During the latter part of November the vessel discharged the fuel oil at Iquique, the crude oil at Valparaiso, and the remaining cargo at Antofagasta. Having discharged all outward cargo, the vessel proceeded in ballast to Talara, Peru, where she loaded a cargo of crude petroleum and cleared November 27, 1940, for Vancouver, B. C. At Vancouver she discharged her entire cargo on December 17, 1940, and proceeded in ballast to Port San Luis, California, where she arrived on December 24, 1940 (Fdgs. V-XII; R. 61-62).

On arrival at Port San Luis the master entered the vessel at the Customs House and filed a master's oath "On Entry of Vessel from Foreign Port," which showed the vessel as arriving from a voyage which "began at Talara, Peru on November 28, 1940, and included the following ports from which said vessel sailed in the order and on the dates stated, viz., Vancouver, B. C., 12/17/40" (Exhibit A, R. 9 and 36). This oath was filed only after refusal of the Deputy Collector of Customs at Port San Luis to accept a master's oath which showed the *Montebello* as arriving from Vancouver, Canada. Upon the entry of the vessel and the filing of the oath the defendant demanded and collected tonnage duty at the rate of 6 cents per ton in the total sum of \$306.42. Thereafter the crew was paid off and discharged before a United States Shipping Commissioner and the vessel surrendered her certificate of registry and was issued a certificate of enrollment and license entitling her to engage in the coastwise trade (Fdgs. XIII-XVI, R. 63).

Plaintiff, by letter of May 7, 1941 (Exhibit C, R. 16-17) applied to the Director of the Bureau of Marine Inspection and Navigation for refund of \$204.28, representing the difference between the amount of tonnage tax collected at the

6-cent rate and the amount computed at the 2-cent rate which plaintiff deemed applicable. The defendant collector procured from the deputy collector at Port San Luis a report of facts relating to the imposition and collection of the tax (Exhibit D, R. 18-19) and transmitted the application for refund and the report to the Director by letter of May 14, 1941 (Exhibit E, R. 13-14). The administrative practice of the Director was to afford any party in interest upon request an opportunity to appear and be heard either before the Director or one of his assistants, but neither customs brokers who entered vessels nor the owners of the vessels were ever advised that an oral hearing could be had. About May 31, 1941 [sic] the Director after deliberation found and decided that the tonnage taxes collected were correctly assessed and denied plaintiff's application for refund. This opinion and decision of the Director is contained in a letter of May 21, 1941 [sic] (Exhibit G, R. 21-23) and plaintiff was duly notified (Fdgs. XVII-XIX, R. 64-65). As a final finding of fact the court stated:

The court finds that the demand and collection of said tonnage duty or tax in excess of two (2) cents per ton from the plaintiff was and is illegal, arbitrary, oppressive and deprives plaintiff of his property without due process of law (Fdg. XXIV, R. 66).

The Decision Below.—In its opinion (R. 45-47) and conclusions of law (R. 66-67) the District Court held it had jurisdiction of the action to recover the alleged overpayment by suit against the collector and was entitled to consider the case *de novo* and substitute its interpretation of the tonnage tax statute for that of the Director.

It declared (R. 47-48) that the finality given the Director's decisions was limited to preventing administrative review and stated:

Prior to the enactment of the Act of July 5, 1884, an appeal could be taken to the Secretary of the Treasury for a refund of tonnage, (Act of June 30, 1864) and to the Department of State upon the interpretation of treaties involving the collection of said tax. The Act

of July 5, 1884, was a reorganization measure. See statement, Representative Dingley, 15 Congressional Record, Part 4. This Act ended administration confusion and made the decision of the Commissioner of Navigation final, thus terminating appeals to the Secretary of the Treasury, the Secretary of State, or any other administrative head. There was no intention on the part of Congress to deprive the courts of jurisdiction.

In support of this conclusion the court relied on the Attorney General's failure to appeal from the decision overruling the collector's demurrer to the shipowner's complaint in *Laidlaw v. Abraham*, 43 Fed. 297 (1890, C. C. Ore.) and the fact that Section 24 of the Judicial Code, 1911 (28 U. S. C. 41 (5)), in conferring jurisdiction on the district courts, retains the specific reference to suits involving tonnage statutes.

With respect to the interpretation of the tonnage tax statute, the court declared (R. 54-55), that "a vessel enters the United States from that foreign port from which she last cleared". It rejected the theory of the Director's decision, that the vessel entered from Talara since it was always her intention to accomplish a voyage to South America and back to a Pacific Coast United States port, and stated that as the defendant did not plead and prove that in calling at Vancouver, B. C. the vessel was attempting deliberately to evade payment at the 6-cent rate, the action of the defendant collector must be deemed arbitrary.

Finally, the court concluded (R. 56-59) that it had jurisdiction of an action against the defendant collector, despite his having deposited the funds into the Treasury. It relied particularly on *DeLima v. Bidwell*, 182 U. S. 1 (1901), as holding that such payment over of the funds was no longer a defense in view of Revised Statutes 989, and cited *Border Line Transportation Co. v. Haas*, 128 F. (2d) 192 (1942, C. C. A. 9) and *Cosulich Line v. Elting*, 40 F. (2d) 220 (1930, C. C. A. 2), as sustaining the jurisdiction. No reference was made to the absence of protest.

SPECIFICATIONS OF ERROR

1. The Collector of Customs, acting in his official capacity as an officer of the Government, may not be sued in the District Court for the recovery of erroneously assessed tonnage duties. Such a suit is in reality one against the United States which may not be maintained unless the United States has consented to be sued in such form. That consent is lacking.

2. The District Court lacks jurisdiction over a controversy involving the assessment, collection, and refund of tonnage taxes. The decision of the Director of the Bureau of Marine Inspection and Navigation as to the correctness of the assessment by the Collector of Customs is final and not subject to judicial review.

3. The determination by the Collector of Customs, as affirmed by the Director of the Bureau of Marine Inspection and Navigation, that the *Montebello* entered from Talara, Peru, and not from Vancouver, B. C., being a question of fact, is not subject to judicial review. Even if reviewable by the courts, it should have been given great weight and not overturned unless clearly wrong and unsupported by the evidence.

4. The tonnage taxes were correctly assessed by the Collector of Customs. A vessel arriving in ballast at a port of entry in the United States from a port at British Columbia where said vessel had entered and discharged fully its cargo theretofore loaded at a foreign port for discharge in said port in British Columbia is subject to the payment of tonnage duty or tax at the rate of 6 cents a ton and not at the rate of 2 cents a ton under the provisions of Title 46 U. S. C. 121.

SUMMARY OF ARGUMENT**I**

The Collector of Customs acting in his official capacity as an officer of the Government may not be sued in the district court for the recovery of an excess of tonnage duties alleged to be

erroneously assessed and collected by him. In reality such a suit is against the United States which has not consented to be sued. The cases relied on by the court below involve the individual liability of collectors where payment was made under protest and has been retained by the collector or where the collector is liable for his own wrongful act in exceeding the authority conferred on him by statute. They are not applicable here where plaintiff conceded liability to tonnage tax, paid without protest, and later exhausted his administrative appeal. In such a situation plaintiff is estopped from proceeding against the collector and is confined to his remedy against the United States.

II

In any case the district court lacked jurisdiction to disregard the decision of the Director and try *de novo* a controversy involving the assessment, collection and refund of tonnage taxes. The Act of 1884 makes the decision of the Director final and not subject to judicial review. Only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof and due process are therefore open. When Congress empowers an administrative authority to decide a question finally it must be assumed that it intended the matter to be submitted to the judgment and discretion of trained specialists rather than to a court. Where, as here, the decision of the administrative authority is fully supported by evidence in the record and has a reasonable basis in point of law it may not be overruled.

III

Even if it be held that suit will lie against the collector and that the decision of the Director is subject to review and modification by the court, in the circumstances of the present case, it is clear that the 6-cent rate alone correctly applies. There is no question that the voyage of the *Montebello* was to South American ports and was therefore a voyage within the long-voyage limits. Interpreted in the light of the legislative history and settled administrative construction, the tonnage statute plainly intends that the 2-cent rate shall be applied

only to vessels entering from voyages to short-voyage ports and the 6-cent rate to all those entering from voyages to long-voyage ports.

ARGUMENT

I. Suit will not lie against the collector to recover an alleged excess in tonnage tax paid without protest

The Collector of Customs, acting in his official capacity as an officer of the Government, may not be sued in the District Court for the recovery of an excess of tonnage duties alleged to be erroneously assessed. Such a suit is in reality one against the United States and may not be maintained unless the United States has consented to be sued in that form. Such consent, granted by statute in the case of income taxes and customs duties, has been repealed so far as concerns tonnage taxes. The cases relied on by the court below involve the individual liability of collectors for their own wrongful acts and are inapplicable here where plaintiff conceded liability to tonnage tax and paid without protest but contests the correctness of the classification and rate at which it was assessed and the correctness of the ruling of the Director of the Bureau of Marine Inspection and Navigation ² on its application for refund. In such a situation plaintiff is estopped.

² From 1834 until 1903 vessels were regulated by the Bureau of Navigation, Department of the Treasury. In 1903 Congress caused the regulation of vessels, including the bureaus connected therewith, to be transferred from the Treasury to the Department of Commerce. By proper regulations, the various offices of Collectors of Customs thereafter acted as agents of the Department of Commerce in the administration of navigation laws, including the collection of tonnage taxes. Customs Regulations, 1915, Article 982; Customs Regulations, 1923, Article 1104; Customs Regulations, 1931, Article 208. But decision of the Chief of Bureau in the Department of Commerce is final on all questions of interpretation relating to the collection of tonnage tax and its refund when collected erroneously or illegally. Customs Regulations, 1915, Article 117; Customs Regulations, 1923, Article 120; Customs Regulations, 1931, Article 132c; Customs Regulations, 1937, Article 133c; Department of Commerce, Regulations for documentation, entrance and clearance of vessels, tonnage duties, 1938. III, 4 (c) (46 C. F. R. 3.4 (c)). Subsequent to the transactions involved in the instant case the regulation of vessels was retransferred to the Department of the Treasury by Executive Order No. 9083, dated February 28, 1942, 7 F. R. 1609.

1. *Statutory authority for suit against the collector to recover amounts of tonnage tax alleged to be erroneously assessed existed only between 1864 and 1890 and exists no longer.*— Authority to bring suit to recover tonnage taxes was late in coming and has been lacking for almost two generations. The Supreme Court in *Cary v. Curtis*, 3 How. 236 (1845) held that section 2 of the Act of March 3, 1839, c. 82, 5 Stat. 348,³ which required the Collector of Customs to pay into the Treasury all moneys received “for duties paid under protest against the rate or amount of duties charged” and provided for the refund by the Secretary of the Treasury of any duties improperly collected, effectively abolished all right of suit and left only the administrative remedy. Congress, being then in session, promptly passed the Act of February 26, 1945, c. 22, 5 Stat. 727, providing that nothing in the Act of 1839 should be construed to take away or impair the right to maintain suit against the collector so far as concerned any payment under protest in order to obtain goods, wares, or merchandise. But with respect to duties on tonnage, Congress made no corresponding provision and until 1864 the only remedy was by the administrative appeal.

Statutory authority for suit against collectors for recovery of payments of tonnage duties was not conferred until enactment of section 14 of the Act of June 30, 1864, c. 171, 13 Stat. 214, which became Revised Statutes 2931. That statute extended to tonnage duties a new statutory procedure for payment under protest and suit against the collector and impliedly repeal the Act of 1845⁴ and with it all common-law right of action. *Barney v. Watson*, 92 U. S. 449, 452–453 (1875). This statutory procedure of R. S. 2931 continued in effect until its repeal by section 29 of the Customs Administration Act of June 10, 1890, c. 407, 26 Stat. 131, but exists no longer.

Before the Act of 1864 and subsequent to its repeal no suits at common law appear ever to have been attempted until the institution of the present suit and its companion cases in the

³ Later, R. S. 3010, still in force as 19 U. S. C. 1512.

⁴ The changes of the Act of 1864 were radical in this and other respects. See letter of the Secretary of the Treasury, dated January 18, 1886, House Ex. Doc. 43, 49th Cong., 1st sess., p. 4 [serial vol. 2392].

Southern District of California.⁵ Moreover, during the period of forty-five years while the statute was in effect only two suits against collectors for recovery of tonnage tax are disclosed by the law reports or the records of the Department of Justice. *North German Lloyd S. S. Co. v. Hedden*, 43 Fed. 17 (1890, C. C. N. J.); *Laidlaw v. Abraham*, 43 Fed. 297 (1890, C. C. Ore.). Both those cases were brought under R. S. 2931 against collectors in circumstances similar to those of the instant case.

The *North German Lloyd* case was a test case brought by agreement between the steamship companies and the Government to obtain a judicial settlement of the authority of the Commissioner of Navigation and the Secretary of the Treasury under section 3 of the Act of July 5, 1884, c. 221, 23 Stat. 119 and section 26 of the Act of June 26, 1884, c. 121, 23 Stat. 59;⁶ the identical provisions involved in this case. After trial on the merits judgment was entered for the defendant collector on May 21, 1890. The Court held in accordance with the literal language of section 3 that the decisions of the Commissioner of Navigation respecting the interpretation of the laws relating to tonnage tax were final and the Court had no jurisdiction to review them. In apparent reliance upon the Court's decision, from which no appeal was taken, Congress, by section 29 of the Act of June 10, 1890, c. 407, 26 Stat. 131, expressly repealed R. S. 2931 and, by sections 14 and 15 substituted a new procedure providing for appeal "as to all fees and exactions of whatever character (except duties on tonnage)" to the Board of General Appraisers, now the United States

⁵Two other cases similar to the present are now on appeal to this Court but are stayed pending the outcome of this appeal. *Bryan v. British Ministry of Shipping*, No. 10017; *Bryan v. Tanker Corp.* No. 10018.

⁶As stated by the Court (43 Fed. 17) the plaintiff had appealed to the Secretary of the Treasury and "at the suggestion of the latter officer and with the concurrence of the Department of Justice, brought these actions to determine the authority of the defendants." The Department files show, however, that despite requests by the District Attorney, the Department did not regard the question as needing to be briefed and in its opinion the Court complains (43 Fed. 23) that "the labor and responsibility of the Court have been increased by the omission of the defendants' counsel to furnish any assistance toward the solution of the questions, and permitting them to pass *sub silentio*."

Customs Court.⁷ The matter of tonnage duties was thus returned to the situation in which it had existed from 1839 to 1864 except that final decision was by the Commissioner of Navigation as prescribed by the Act of 1884, instead of by the Secretary of the Treasury.

The *Laidlaw* case had, meanwhile, been independently brought in the Circuit Court at Portland, Oregon, and on August 18, 1890, the Court overruled a demurrer by the collector to the plaintiff's petition. The Court did not consider the *North German Lloyd* case and without substantial discussion held the Commissioner's decisions were final and conclusive only so far as the Treasury Department was concerned. But plaintiff had applied to the Treasury for reconsideration of its application for refund and, before further court proceedings could be had, refund was ordered. In later unreported proceedings a judgment of nonsuit with costs against the plaintiff was entered April 15, 1891.⁸ No appeal was therefore possible.

Regardless of the merits of the respective cases, neither is an authority for plaintiff here. Revised Statutes 2931 now stands repealed and plaintiff can point to no statutory authority for this suit. Neither can it complain of the absence of such authorization, nor the power of Congress to withdraw it. The suit for the refund of taxes is essentially one which is brought against the United States, even though the Collector be the

⁷ *Schoenfeld v. Hendricks*, 152 U. S. 691 (1894). Cf. provisions now in effect, 19 U. S. C. 1514, 1515, derived from sections 514 and 515 of the Tariff Act of June 17, 1930, c. 497, Title IV, 46 Stat. 734.

⁸ The order stated as follows: "Now at this day comes the plaintiff in the above entitled cause by Mr. C. E. S. Wood, of counsel, and the defendant by Mr. Franklin P. Mays, of counsel, and thereupon said plaintiff moves the court for a judgment of nonsuit herein: and it appearing to the court that there has been no counter claim set up in this cause by the defendant, it is considered that said plaintiff take nothing by this action; and that the defendant go hence without day, and that he have and recover of and from said plaintiff his costs and disbursements herein to be taxed."

The assertion of the court below (R. 50) that in failing to appeal from the order overruling its demurrer the Government acquiesced in the views enunciated by the Oregon Court is not understood. Such an order is not appealable and it is evident from the facts stated in the Court's opinion that administrative refund would be ordered if proof of such allegations were submitted. The implication of the Court's opinion that the Government should have continued to refuse a refund justly due solely in order to litigate the jurisdictional point seems opposed to American traditions.

nominal party defendant. Thus, in *Curtis's Administratrix v. Fiedler*, 2 Black 461, 479 (1862), it was said that "the right of action given is in its nature a remedy against the Government." In *Philadelphia v. Collector*, 5 Wall. 720, 733 (1866), the Court said that "a judgment against the collector in such a case is in the nature of a recovery against the United States." In speaking of the suit against the collector, the Court in *Nichols v. United States*, 7 Wall. 122, 127 (1868), after pointing out the sovereign immunity to suit, said that "the allowing of a suit at all, was an act of beneficence on the part of the government." In *Collector v. Hubbard*, 12 Wall. 1, 14 (1870), the Court stated that the remedies for the recovery of taxes "may be withdrawn altogether at the pleasure of the law-maker." In *Auffmordt v. Hedden*, 137 U. S. 310, 329 (1890), the Court said that "the action is, to all intents and purposes, with the provisions for refunding the money if the importer is successful in the suit, an action against the government for moneys in the Treasury." The *Auffmordt* case, with other tax cases, was cited in *Ex parte Bakelite Corp.*, 279 U. S. 438, 451, (1929), to establish the proposition that tax controversies were completely within the control of Congress, and this statement was repeated in *Crowell v. Benson*, 285 U. S. 22, 50-51 (1932). Finally, in *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 382-383 (1933), the Court said:

A suit against a Collector who has collected a tax in the fulfilment of a ministerial duty is today an anomalous relic of bygone modes of thought. He is not suable as a trespasser, nor is he to pay out of his own purse. He is made a defendant because the statute has said for many years that such a remedy shall exist, though he has been guilty of no wrong, and though another is to pay. *Philadelphia v. Collector, supra*, p. 731. There may have been utility in such procedural devices in days when the Government was not suable as freely as now. *United States v. Emery, supra*; *Ex parte Bakelite Corp.*, 279 U. S. 438, 452; Act of February 24, 1855, c. 122, 10 Stat. 612, Secs. 1 and 9; Judicial Code, Sec. 145; 28 U. S. C., Sec. 250; Judicial Code, Sec. 24 (20); 28 U. S. C., Sec. 41 (20). They have little utility today, at

all events where the complaint against the officer shows upon its face that in the process of collecting he was acting in the line of duty, and that in the line of duty he has turned the money over. *In such circumstances his presence as a defendant is merely a remedial expedient for bringing the Government into court.* [Italics added.]

The history of the customs administration would seem to preclude any doubt as to the power of Congress to withdraw suit against the Collector. Not since the Act of 1890 (sec. 25, c. 407, 26 Stat. 131) has it been possible to sue the collector for duties erroneously assessed on imports; the United States has been made the sole party defendant yet the validity of the Act has never been doubted by the courts. *Schoenfeld v. Hendricks*, 152 U. S. 691, 693-695 (1894); *United States v. Passavant*, 169 U. S. 16, 21 (1898); *Ex parte Bakelite Corp.*, 279 U. S. 438, 451-452, 458 (1929); *United States v. Stone & Downer Co.*, 274 U. S. 225, 232-233. (1927).

At the present time, therefore, it is submitted that, unless plaintiff can find authority for proceeding against the collector at common law, it has mistaken its remedy and cannot maintain its action in this form.

2. *Common law principles do not support an action against the collector in the circumstances of this case.*—The common law liability of the collector is personal. It is based in differing circumstances upon two distinct theories. On the one hand, where the collector has acted in good faith but is in possession of the money, the law will imply an obligation to restore it. In this situation payment over by the collector is a complete defense. On the other hand, where the collector has acted wrongfully and with knowledge, the law will imply an obligation to make the taxpayer whole and leave to a collector who has paid over the problem of obtaining reimbursement.

The first theory involves an application of the basic principle in the law of agency that the agent of a known principal is not liable for the repayment of funds which he has transmitted to his principal. *Sadler v. Evans*, 4 Burr. 1984 (1766);

Bullar v. Harrison, 2 Cowp. 565 (1777); *East India Co. v. Tritton*, 3 B. & C. 280 (1824); *White v. Bartlett*, 9 Bing. 378 (1832); *Hooper v. Robinson*, 98 U. S. 528, 540-541 (1878); *Baldwin v. Black*, 119 U. S. 643, 647 (1887). While the general rule is that notice of the claim before transmission by the agent to the principal is sufficient to hold the agent, it appears to be settled that a public agent who is under a duty to pay the money over irrespective of opposing claims will not be held. As early as 1792 Lord Kenyon, in *Greenway v. Hurd*, 4 Term R. 553, 555, with specific application to a crown revenue agent, said:

If the defendant had not paid the money over, he would have subjected himself to punishment; and it would be hard that he should also be punished by an action if he did pay it over.

See also *Horsfall v. Handley*, 8 Taunt. 136, 138 (1818).

When a test case was desired, the collector retained the money in his hands, with the consent of the Attorney General. *Campbell v. Hall*, 1 Cowp. 204 (1774). And in *Whitbread v. Goodsbank*, 1 Cowp. 66, 69 (1774), Lord Mansfield insisted that the record show a similar action was a consent suit, else "it might be of great inconvenience if this case should hereafter be made a precedent."⁹

In the United States this rule has been fully accepted and often applied by the Supreme Court. *Elliott v. Swartout*, 10 Pet. 137, was decided in 1836. At that time the collector was under no duty to pay into the Treasury taxes paid under protest. The Court held that illegal taxes paid under protest could

⁹These early cases seem still to be the law. The absence of more recent cases may be traced to the availability of special statutory remedies. See, for example, 8 & 9 Geo. V, c. 40, Secs. 147-151; 57 & 58 Vict., c. 30, Sec. 8 (12); 23 & 24 Geo. V, c. 36. It is significant that, in numerous cases attempting to bring a petition of right or mandamus to recover taxes (remedies conditioned upon the absence of another remedy), the courts have never suggested the availability of assumpsit. *The Queen v. The Commissioners*, 12 Q. B. D. 461 (1884); *Holburn Viaduct Land Co. v. The Queen*, 52 J. P. 341 (1887); *Commissioners v. Pemsel* [1891], A. C. 531; *Malkin v. King* [1906], 2 K. B. 886; *William Whitley, Ltd. v. Rex*, 127 L. T. 619 (1909); *Bristol Channel Steamers, Ltd. v. The King*, 40 T. L. R. 550 (1924).

be recovered from the collector, even though he had thereafter paid them into the Treasury, while taxes whose payment was not protested could not be recovered from the collector after payment into the Treasury.

The Court has many times reaffirmed the principle that there can be no common law action against a Collector for the recovery of taxes after he has paid them into the Treasury pursuant to his statutory duty, and that whatever remedy the taxpayer may have is solely the creation of the statute. *Nichols v. United States*, 7 Wall. 122, 126-127 (1868); *Barney v. Watson*, 92 U. S. 449, 452 (1875); *Arnson v. Murphy*, 109 U. S. 238, 240, 243 (1883); *Auffmordt v. Hedden*, 137 U. S. 310, 329 (1890); *Schoenfeld v. Hendricks*, 152 U. S. 691, 693 (1894). The reasons which compel this result are perhaps best stated in *Curtis's Administratrix v. Fiedler*, 2 Black 461, 478 (1862):

Indebitatus assumpsit is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfill that obligation. Such a promise, says the Court, is always charged in the declaration, and must be so charged in order to maintain the action. But the law never implies a promise to pay unless some duty creates such an obligation, and more especially it never implies a promise to do an act contrary to duty or contrary to law.

The decisions are unequivocal. Their principle, that there can be no common law action in *assumpsit* against the Collector for the recovery of taxes once paid into the Treasury, has been expressly stated by the Supreme Court in numerous cases extending over a period of almost a century.

We freely concede that, despite payment over, the Collector may be liable on the alternate theory for his own wrongful act if he acts outside the scope of his authority and collects, under the color of his office, taxes which are plainly unauthorized. See *In re Fassett*, 142 U. S. 479, 487 (1892); *De Lima v.*

Bidwell, 182 U. S. 1, 179 (1901); *Gonzales v. Williams*, 192 U. S. 1, 15 (1904); cf. *Passavant v. United States*, 148 U. S. 214, 219 (1893).

De Lima v. Bidwell, is the leading case on this theory of a collector's liability. There the Supreme Court decided that, after the passage of the Customs Administration Act, where a collector was sued to recover back an overpayment of money exacted as duties upon goods alleged never to have been imported at all, the common law right to sue the collector still existed. The theory of the case was that the collector did not act as an officer of the United States when he exacted duties with respect to goods which had never been imported and, hence, over which a collector could have no official jurisdiction. The Court took the position that in such a case the most that could be said of the collector's conduct was that he acted "under color of the revenue laws" and in such circumstances the revenue laws could afford no protection from suit against him individually. No more would his payment into the Treasury of money which he had no jurisdiction to collect afford a bar, especially since under R. S. 989 the judgment against him would be paid out of an appropriation from the Treasury. The Court distinguished *Arnson v. Murphy*, *Schoenfeld v. Hendricks*, and *Barney v. Watson*, *supra*, on the ground that those cases related to situations where there had been an admitted entry of the merchandise. Obviously, in such situations, the collector had not acted wrongfully since he had official jurisdiction to determine the amount of duty payable with respect to the entries and in collecting the duties acted in his official capacity even if his decision as to the amount to be assessed and collected was erroneous.

On either theory, however, the common law liability of a collector is personal, not official. The right of action is against him individually. *Sage v. United States*, 250 U. S. 33 (1919); *Smietanka v. Indiana Steel Co.*, 257 U. S. 1 (1921); *Union Trust Co. v. Wardell*, 258 U. S. 537 (1922). Its form is *indebitatus assumpsit*, on a promise implied in law based either upon the collector's continued possession or control of money mistakenly collected or upon his own wrongful act together with the doctrine that in either situation he should, *ex aequo et bono*,

return the money collected. But such a promise, will be implied only where the collector has misinterpreted the law, or acted without authority of law to plaintiff's prejudice; and where, also, plaintiff has made due protest at the time of payment against the collector's action in order that the collector may have opportunity either to correct his action or to protect himself by withholding the money collected until his right to make the collection can be adjudicated. *Elliott v. Swartout*, 10 Pet. 137 (1836); *Bend v. Hoyt*, 13 Pet. 263 (1839).¹⁰

Plaintiff in the instant case has failed entirely even to attempt to bring itself within either theory. The complaint contains no allegation that the defendant collector unjustly detains the money nor, on the other hand, that he collected the taxes outside his official duties. In particular, plaintiff has failed to plead or prove that its payment to the deputy collector on December 24, 1940, was under any protest. On the contrary, the agreed facts show that the master filed an oath on entry showing the voyage to have begun at Talara and paid tax without protest at the 6-cent rate. Even when defendant had accounted for the collection and it was doubtless too late for him to accept a substitute oath and revise the assessment, no attempt was made by plaintiff to protest against the action as an individual wrongful act of defendant nor to advise him that it was plaintiff's intention to hold him individually liable. Plaintiff's only action was to apply to the Director for refund in accordance with the statutes and regulations. The regulations (*infra*, p. 54) make plain that protest against payment and any subsequent application for refund are distinct acts. Indeed, it was not until four months after the payment of December 1940 that defendant learned from plaintiff's letter of May 7, 1941, applying to the Director for refund, that plaintiff seriously contested the classification and rate of assessment. But even then, plaintiff's application to the Di-

¹⁰ The indispensability of protest has been repeatedly emphasized. *Elliott v. Swartout*, *supra*, at 152; *Marcell v. Griswold*, 10 How. 242, 255 (1850); *Union Pacific R. R. Co. v. Com'rs*, 98 U. S. 541, 544-546 (1878); *United States v. Cuba Mail S. S. Co.*, 200 U. S. 488, 494 (1906); *Dewell v. Mix*, 116 Fed. 664, 666 (1902, C. C. Conn.); see *Philadelphia v. Collector*, 5 Wall. 720, 731-732 (1866).

rector for refund is incompatible with any interpretation other than that plaintiff recognized and accepted the procedure set up in the regulations whereby defendant had no discretion but the Government itself, acting by the hand of the Director, its officer specially authorized thereto, was alone responsible for the rate of assessment contested by plaintiff.

In a case such as the present, the administrative procedure resulting from the provisions of section 3 of the Act of July 10, 1884, and section 26 of the Act of June 26, 1884, together with plaintiff's action in accepting and following without objection the steps prescribed in the regulations for invoking relief thereunder, entirely removed the matter of collection from the control of the defendant collector. Once the master gave, and the collector accepted, an oath on entry of the vessel which showed the voyage was from Talara, the collector became responsible under his bond for collecting and depositing tax at the 6-cent rate. Whatever might have been the case had plaintiff paid under protest and at once brought suit against the collector, by electing to follow the procedure prescribed by the regulations, plaintiff made the collector its mere instrumentality to effect deposit of the money into the Treasury. Plaintiff is now estopped to turn against the collector personally.

In this posture, accordingly, a suit against the collector can only be against him officially on account of his official acts and doings pursuant to the oath on entry of the vessel which was filed without protest. It cannot be based upon any personal wrong by the collector.¹¹ The collector's defense is not only that, on the one hand, he is required to turn over plaintiff's payment to the treasury and has done so, but that, on the other, in receiving the money voluntarily paid by plaintiff without protest he merely performed his ministerial duty and did not act wrongfully or violate plaintiff's rights since all that plaintiff could require of him was proper performance of that duty.

¹¹ Cf. *Anniston Mfg. Co. v. Davis*, 87 F. (2d) 773, 778-779 (1937, C. C. A. 5), aff'd 301 U. S. 337; *Haskins Bros. v. Morgenthau*, 85 F. (2d) 677, 683 (1936, App. D. C.), cert. den., 299 U. S. 588. The collector had no discretion to collect tax at the 2-cent rate on a voyage stated in the oath on entry to have begun at Talara, nor any authority to review the decisions of the Director or exercise any control over him and his interpretation of the law.

3. *No reason advanced by the plaintiff or the court below justifies departing from the established requirements for suit against the collector.*—In *DeLima v. Bidwell*, 182 U. S. 1, 176 (1901), the Court observed, “If there be an admitted wrong the Courts will look far to supply an adequate remedy.” But no such problem is presented here. In the present matter, whether or not the courts are concluded by the decision of the Director concerning the interpretation of the law and the classification and rate of assessment applicable and are without jurisdiction to review it, plaintiff has the right to bring suit against the United States under the Tucker Act for any amount due him.¹² There is no reason to seek afar for a remedy nor to disregard the settled requirements for suit against the collector. Plaintiff’s remedy for recovery of tonnage tax is ready to hand in a suit against the United States under the Tucker Act. *The Sophie Rickmers (Rickmers Rhederi, A. G. v. United States)*, 45 F. (2d) 413 (1930, S. D. N. Y.); *Flensburger Dampfercompagnie v. United States*, 73 Ct. Cls. 646, 59 F. (2d) 464 (1932), cert. den. 286 U. S. 564; *Standard Oil Co. v. United States*, 77 Ct. Cls. 205, 2 F. Supp. 922 (1933), cert. den., 290 U. S. 632.

The conclusion of the court below that plaintiff could proceed by suit against the collector is palpably erroneous. It stems from an incorrect appreciation of the principle of cases such as *Border Line Transportation Co. v. Haas*, 128 F. (2d) 192 (1942, C. C. A. 9); *Cosulich Line v. Elting*, 40 F. (2d) 220 (1930, C. C. A. 2) and *DeLima v. Bidwell*, 182 U. S. 1, 179

¹² Act of March 3, 1887, as amended 28 U. S. C. 41 (20), 761–765; *Carriso Inc. v. United States*, 106 F. (2d) 707 (1939, C. C. A. 9); *Compagnie Generale Transatlantique v. United States*, 26 F. (2d) 195, 197 (1928, C. C. A. 2), aff’g 21 F. (2d) 465, 466. It is elementary that the need for suit may exist even where the Director has decided that an overpayment has been exacted. The power under 46 U. S. C. 3 of interpreting the tonnage laws and the power under 18 U. S. C. 643 of ordering repayment are not lodged in the same hands. See 19 Ops. A. G. 660, 665; 28 Ops. A. G. 21, 23. Even after a favorable decision by the Director, refund under 18 U. S. C. 643 might not be ordered, and, if ordered, payment might well be withheld by the General Accounting Office on account of a claim of set-off by the United States. See 31 U. S. C. 71, 74, 93. The direct means of suit against the United States is available whether or not the anomalous and circuitous procedure of suit against the collector may also be available. Cf. *United States v. Emery*, 237 U. S. 28, 31–32 (1915); *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 382 (1933).

(1901) cited by the Court, as well as of the purpose and effect of R. S. 989 (28 U. S. C. 842). The court below predicates its decision upon what it appears to regard as an established right to maintain an action against a collector for any part of any tax payment claimed not to be validly due. This we have seen (*supra*, p. 17) is opposed to, not supported by, *DeLima v. Bidwell*. The *Border Line* and *Cosulich Line* cases, like the *DeLima* case, involved situations where the issue was as to the collector's authority to impose any charge at all, not merely as to the classification and rate of assessment where something was admitted due.¹³ This is the distinction which the Supreme Court carefully pointed out in the *DeLima* case between cases where the collector's individual liability rests upon his own wrong in acting under color of authority to collect duties where no jurisdiction to collect duty exists and cases, like the present, where the liability to payment is conceded but there exists a controversy concerning the classification and rate of assessment. Exactly the same distinction exists in the case at bar.

It is common ground that the *Montebello* made entry and that tonnage duty was payable on account thereof so that the only question plaintiff is seeking to litigate is the classification and rate of duty and the amount payable. It follows that the defendant collector, in exacting payment, acted within the jurisdiction conferred by the statute and in his official capacity as a government officer and not tortiously or under color of his office. He received the taxes legally and he cannot refund them even if he were to agree with plaintiff that the decision of the Director has erroneously interpreted the law and arbitrarily denied the refund. Unlike the situation in the *DeLima*, *Border Line*, and *Cosulich Line* cases, there was jurisdiction to impose tonnage tax and therefore jurisdiction for the Director to interpret the law and determine the classification and rate.

¹³ Incidentally it should be noted that all three cases expressly state that the plaintiff, unlike plaintiff here, had made proper and timely protest to the collector. See *DeLima v. Bidwell*, 182 U. S. at 2; *Border Line Transportation Co. v. Haas*, 128 F. (2d) at 192; *Cosulich Line v. Elting*, 40 F. (2d) at 221. Cf. *Royal Mail Steam Packet Co. v. Elting*, 66 F. (2d) 516, 518 (1933, C. C. A. 2); *Transatlantica Italiana v. Elting*, 66 F. (2d) 542, 544 (1933, C. C. A. 2).

Plaintiff's complaint may be against the Director or the United States but it is not against any personal action by the collector.¹⁴

The Director's decision is a complete protection to the collector in the same way that the decision of a court is a complete protection to the marshal. The Director's decision is no more void than is the judgment of a court when it has jurisdiction of the parties and the subject matter. Either may or may not be subject to further review by some other tribunal. Either, if reviewable, may, if erroneous, be subject to correction. But to hold the defendant collector liable would require holding his act to be individually wrongful, which in turn would involve the assertion of the right of the collector to disregard the decisions of the Director and thus substitute the collector instead of the Director as the final authority in such cases. Such a result is directly contrary to the express language and intent of section 3 of the Act of July 5, 1884, and would destroy all uniformity of interpretation and seriously obstruct the enforcement of the law and the collection of the revenue.

Nor will Revised Statutes 989 support the action against the collector. The supposition that R. S. 989 standing alone amounts to an authorization by the United States to be sued in the name of the collector, was definitely rejected in *United States v. Kales*, 314 U. S. 186, 197-200 (1941) and *United States v. Nunnally Investment Co.*, 316 U. S. 258, 262-264 (1942). Those cases finally set at rest all contention to that effect. In *Kales'* case the Court observed (at p. 199):

Notwithstanding the provision for indemnifying the collector and protecting him from execution, the nature and extent of the right asserted and the measure of the recovery remain the same.¹⁵

¹⁴ The point was not made in the court below, but logically if the suit can be viewed as against anyone other than the United States, the Director is an indispensable party who has not been joined. The collector was his mere agent and subordinate in the matter, responsible to him and bound to abide by his instructions and decisions. Cf. *Guerich v. Rutter*, 265 U. S. 388, 391 (1924); *Webster v. Fall*, 266 U. S. 507 (1925); *Warner Valley Stock Co. v. Smith*, 165 U. S. 28 (1897); *Ncher v. Harwood*, 128 F. (2d) 846 (1942, C. C. A. 9), cert. den. 317 U. S. 659.

¹⁵ In *Smietanka v. Indiana Steel Co.*, 257 U. S. 1 (1921), holding no action lies against a collector for collections made by his predecessor, the court

In the absence of some other statute expressly granting a remedy by suit against the collector,¹⁶ no action will lie except for his individual liability which still rests exclusively upon his continued possession of the funds or his individual responsibility for his own illegal acts committed either in his own discretion or under instructions which he was bound to recognize as unlawful because they exceeded the jurisdiction conferred by the statute or the statute was unconstitutional.

This conclusion is obvious from the plain language and the legislative history of R. S. 989. As we have seen, Congress, by the Act of 1845, reinstated the right to bring suit against the collector so far as concerned duties on merchandise. But, although the Government was bound to pay the judgments, collectors were still held subject to levy of execution in such suits¹⁷ so that Congress, to protect them, provided by the Act

had already pointed out that R. S. 989 is not an absolute protection. The collector is still subject to the court's discretion in making the certificate under the Act. The action is therefore still personal and can be maintained only for his own wrongful act and is not converted into one in effect against the United States. The Court explains (pp. 4-5): "To show that the action still is personal, as laid down in *Sage v. United States*, 250 U. S. 33, 37 [1919], it would seem to be enough to observe that when the suit is begun it cannot be known with certainty that the judgment will be paid out of the Treasury. That depends upon the certificate of the Court in the case. It is not to be supposed that a stranger to an unwarranted transaction is made answerable for it; yet that might be the result of the suit if it could be brought against a successor to the collectorship. A personal execution is denied only when the certificate is given. It is true that in this instance the certificate has been made, but the intended scope of the action must be judged by its possibilities under the statutes that deal with it. The language of the most material enactment, Rev. Stats. sec. 989, gives no countenance to the plaintiff's argument. It enacts that no execution shall issue against the collector but that the amount of the judgment shall be provided for and paid out of the proper appropriation from the Treasury, when and only when the Court certifies to either of the facts certified here, and 'when a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him, and by him paid into the Treasury, in the performance of his official duty.' A recovery for acts done by the defendant is the only one contemplated by the words 'by him.' The same is true of Rev. Stats., sec. 771, requiring District Attorneys to defend such suits."

¹⁶ Cf. *Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 382 (1933), characterizing such statutes as anomalous now that the Tucker Act authorizes suit against the United States.

¹⁷ *Knoedler v. Schell*, 14 Fed. Cas. No. 7, 889 (1861, C. C. N. Y.); S. Rept. 299, 36th Cong., 2d sess. [ser. vol. 1090].

of March 3, 1863, c. 76, § 12, 12 Stat. 741 (R. S. 989, 28 U. S. C. 842) that—

When a recovery is had in any suit or proceeding against a collector or other officer of the revenue for any act done by him, or for the recovery of any money exacted by or paid to him and by him paid into the Treasury, in the performance of his official duty, and the court certifies that there was probable cause for the act done by the collector or other officer, or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against such collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury.

The conditional language shows it was not to impose additional liabilities on the collectors but solely as a further protection. Decisions of the Supreme Court have settled that the provision affords a collector, when found individually liable, full protection both where he has acted individually for probable cause (*DeLima v. Bidwell*, 182 U. S. 1, 176-179 (1901)) and where he has acted under the express direction of his superior (*Moore Ice Cream Co. v. Rose*, 289 U. S. 373, 381-383 (1901)). But as before, once he has parted with the money the collector is only suable by statutory authorization or for illegal exactions by his own wrongful acts in exceeding the limits of his authority or in executing commands of his superiors clearly illegal on their face.¹⁸ It does not, as the court below seems to have assumed, render the liability of the collector coterminous with that of the United States.

¹⁸ Similarly it leaves unaltered the requirement that the payment be not only involuntary but under protest and in the absence of a statute expressly relieving plaintiff of the necessity of protest, as was the case in *Moore Ice Cream Co. v. Rose*, *supra*, the collector will only be liable where proper protest was made at the time of payment.

II. The determination of the director is final and conclusive as to the correctness of the assessment of tonnage tax

Even if suit would lie against the defendant collector the district court lacked jurisdiction to disregard the decision of the Director and try *de novo* a controversy involving the assessment, collection, and refund of tonnage taxes. Under the Act of 1884 the decision of the Director of the Bureau of Marine Inspection and Navigation upon plaintiff's application for refund of an alleged over-assessment is final and not subject to judicial review. Only questions affecting constitutional power, statutory authority, and the basic prerequisites of proof and due process are open. The jurisdiction of the court is restricted and if these legal tests are satisfied the administrative determination is incontestable.

The apparent theory of plaintiff's case is that the determination of the Director can be ignored if suit is brought against the collector to recover the payment¹⁹ rather than directly against the Director or against the United States to obtain the refund which the Director denied in accordance with his interpretation of the statute. Nowhere in the complaint (R. 2-5) is the application for refund or the Director's denial mentioned, unlike the *North German Lloyd* and *Laidlaw* cases where the plaintiff expressly sought review of the administrative decisions under R. S. 2931. The reason of this procedure appears to be a contention that section 24 of the Judicial Code (28 U. S. C. 41 (5)) confers jurisdiction of suits involving tonnage revenue and that in a suit against the collector, a third party, the mere expression of finality of decision by the Director should not imply a limitation upon the jurisdiction of the court to examine the question *de novo*.²⁰

¹⁹ We have already pointed out (*supra*, pp. 18 and 21 note 13) that plaintiff forestalled itself in this regard by paying without protest so that in law the payment must be deemed voluntary.

²⁰ The opinion of the court below (R. 52-53) seems to indicate a belief that the parties were divided on the question of jurisdiction of the action itself rather than the limits of the court's jurisdiction to reexamine *de novo*

The substance of this astounding proposition seems to come down to a notion that the Director's decision may be ignored in a collateral attack, even though if directly challenged it would be conclusive unless beyond his statutory authority, arbitrary or unsupported by evidence. This argument that an administrative decision has *less* weight in a collateral than in a direct attack apparently seeks to reverse the usual rule against collateral attack upon administrative or judicial proceedings alike. Such a position is plainly untenable under decisions involving other administrative bodies. Cf. *Adams v. Nagle*, 303 U. S. 532, 540 (1938); *Butte, A. & P. Ry. Co. v. United States*, 290 U. S. 127, 136 (1933); *Cragin v. Powell*, 128 U. S. 691, 698 (1888); and consider generally *Yakus v. United States*, 321 U. S. 414, 433 (1944).

Although our primary position is that the determination of the Director is binding upon the courts in every case unless it exceeds his statutory authority or is arbitrary and capricious, it may also be suggested that, by reason of the peculiar language of section 3 of the Act of 1884, the scope of judicial review of the Director's determination may be even more restricted than in many situations dealt with in the reported cases under other statutes. Section 3 does not confine the Director to the finding of facts but expressly declares his decision final on "all questions of *interpretation* growing out of the execution of *the laws*" relating to the collection of tonnage tax. It would seem that Congress intended thereby to extend his duty and authority to the weighing of the circumstances with a view to reaching a conclusion as to the character of a vessel's voyage in the light of the dominant characteristics of the maritime operations in which the vessel is engaged, even though in some situations this could be deemed a question of law.

1. *The cases of Cary v. Curtis and North German Lloyd v. Hedden fully establish that the court had no jurisdiction to*

the point determined by the Director. Obviously the fact that Congress continues the jurisdiction of the court with respect to actions concerning tonnage duties can not indicate that its jurisdiction to review the administrative decision does not continue to be limited to determining whether constitutional and statutory authority were exceeded and due process observed.

examine the case de novo.—In *Cary v. Curtis*, 3 How. 235 (1845), the Supreme Court of the United States held that Congress might validly constitute the Secretary of the Treasury the sole tribunal for the examination of claims for duties said to have been improperly paid. There the Act of 1839 (c. 82, 5 Stat. 348) directed collectors to pay into the Treasury all duties (including tonnage duties) collected whether under protest or not and provided, “whenever it shall be shown to the satisfaction of the Secretary of the Treasury that in any case of * * * duties paid under protest, more money has been paid to the collector * * * than the law requires should have been paid, it shall be his duty to draw his warrant upon the Treasurer in favor of the person or persons entitled to the overpayment.” Despite the statute, suit was brought against the collector and the circuit court certified the matter for decision by the Supreme Court. The Supreme Court held the provision valid under the long-established rule that in matters of fiscal concern governments may resort to summary administrative process and thereby withdraw jurisdiction for judicial review of the administrative determination from the courts.²¹ Said the Court (pp. 242, 245–246):

It will not be irrelevant here to advert to other obvious and cogent reasons by which Congress may have been impelled to the enactment in question; reasons which, it is thought, will aid in furnishing a solution of their object. Uniformity of imports and excises is required by the Constitution. Regularity and certainty in the payment of the revenue must be admitted by every one as of primary importance: they may be said almost to constitute the basis of good faith in the transactions of the government; to be essential to its practical existence. * * * We have no doubts of the objects of the import of that act; we cannot doubt that it constitutes the Secretary of the Treasury the source whence instructions

²¹ Cf. *Auffmordt v. Hedden*, 137 U. S. 310, 324 (1890); *Hilton v. Merritt*, 110 U. S. 97, 107 (1884); *Springer v. United States*, 102 U. S. 586, 593–594 (1880); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 282 (1855). See cases and other authorities collected by Brandeis, J. in *Phillips v. Commissioner*, 283 U. S. 589, 594–595 (1931).

are to flow: that it controls both the position and the conduct of collectors of the revenue. * * * has ordered and declared those collectors to be the mere organs of receipt and transfer, and has made the head of the Treasury Department the tribunal for the examination of claims for duties said to have been improperly paid. * * * In devising a system for imposing and collecting the public revenue, it was competent for Congress to designate the officer of the government in whom the rights of that government should be represented in any conflict which might arise, and to prescribe the manner of trial. It is not imagined, that by so doing Congress is justly chargeable with usurpation, or that the citizen is thereby deprived of his rights. There is nothing arbitrary in such arrangements; they are general in their character; are the result of principles inherent in the government; are defined and promulgated as the public law. * * * The courts of the United States can take cognisance only of subjects assigned to them expressly or by necessary implication; *a fortiori*, they can take no cognisance of matters that by law are either denied to them or expressly referred *ad aliud examen*.

But whilst it has been deemed proper, in examining the question referred to by the Circuit Court, to clear it of embarrassments with which, from its supposed connection with the Constitution, it is thought to be environed, this court feels satisfied that such embarrassments exist in imagination only and not in reality: that the case and the question now before them present no interference with the Constitution in any one of its provisions.

The question of the effect and constitutionality of such provisions was thus put at rest a hundred years ago and the rule of this great foundation case of *Cary v. Curtis* has since been consistently accepted. See *Ex parte Bakelite Corp.*, 279 U. S. 438, 458 (1929); *Fong Yue Ting v. United States*, 149 U. S. 698, 714-715 (1893).

Until the enactment of section 14 of the Act of 1864 (see *supra*, p. 10), the regime of the Act of 1839 provided the only remedy for recovery of overpayment of tonnage tax. *Cary v. Curtis* was itself directly applicable. Section 2 of the Act of July 5, 1884, c. 221, 23 Stat. 119, as amended (46 U. S. C. 3, appendix, *infra*, p. 53), the statute here involved, marked a return to this same regime after the interval under the Act of 1864 which permitted the court review. It differs from the Act of 1839 involved in *Cary v. Curtis* principally in providing more explicitly the finality to be accorded the administrative decision. It charges the Director with supervision of the tonnage laws and provides in substance that, "on all questions of interpretation growing out of the execution of the laws relating to the collection of tonnage tax and to the refund of such tax when collected erroneously or illegally, his decision shall be final."

The language and the internal economy of the provision follows closely that in R. S. 2930, providing for reappraisement of merchandise in the event of the importer's dissatisfaction and directing that "the appraisement thus determined shall be final and be deemed to be the true value."²² Under R. S. 2930 the expression "shall be final" had an established meaning in 1884 when Congress followed it in framing the new Act. It excluded all possibility of a trial *de novo*. It was settled that except for questions of statutory authority, fraud, and irregularity, the decision of the appraisers was conclusive and no jurisdiction for review existed under R. S. 2931, which gave the right of appeal to the Secretary of the Treasury, when duties were alleged to have been illegally or erroneously exacted and the right of judicial review in the event of an adverse decision by the Secretary. *Hilton v. Merritt*, 110 U. S. 97, 104 (1884);

²² Where, on the contrary, finality was to be confined to the executive branch of the Government and the courts left with jurisdiction to review the determination of the administrative authority, the law makers were at pains to say so plainly. Cf. R. S. 191, providing: "The balances which may from time to time be * * * certified to the heads of departments by the Commissioner of Customs, or the Comptrollers of the Treasury, * * * shall be conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts."

Bartlett v. Kane, 16 How. 263, 272 (1853).²³ The bill resulting in the Act of 1884 was a reorganization measure intended to simplify and consolidate in a single bureau the duties respecting navigation and tonnage taxation.²⁴ It appears obvious, therefore, that Congress in providing that the interpretations of the chief of the new navigation bureau "shall be final" intended to give to his determinations relating to the collection of tonnage tax the same finality and freedom from review by the Secretary and the courts which that form of words had been held to give determinations by the appraisers respecting the valuation of merchandise.²⁵

But aside from the plain meaning of its express terms and their legislative origin, in no event can the effect and validity of section 3 of the Act of 1884 be regarded as a novel question. A test case, for the very purpose of determining the authority granted by section 3 was brought by agreement between the

²³ *Accord, Oelbermann v. Merritt*, 123 U. S. 356, 361 (1887); *Passavant v. United States*, 148 U. S. 214, 219-220 (1893), decided subsequent to 1884. For a summary of the situations which had been held subject to examination by the courts, see *Auffmordt v. Hedden*, 137 U. S. 310, 328 (1890); *Muser v. Magonc*, 155 U. S. 240, 247 (1894).

²⁴ See H. Rept. 281, 48th Cong., 1st sess. [serial vol. 2253], 15 Cong. Rec. 3194.

²⁵ There was no question in the mind of the first Commissioner of Navigation that this was its effect. In his *Annual report for the year ending June 30, 1885*, the first full year of the Bureau's existence, he stated (p. 4): "It is found that the business of these various branches, so closely allied, can be more economically and much better done under the present consolidation than under the old system, which divided it among several bureaus and numerous courts, and in certain cases caused a duplication of the work as well as some lack of harmony." [Italic supplied.] Similarly in *Short, Bureau of Navigation, its history, activities, and organization*, (Institute for Government Research: Service Monograph No. 15: 1923) it is stated (p. 46): "The Attorney General has ruled and the courts have sustained the contention that the decisions of the Commissioner in respect to these matters [collection and refund to tonnage tax] cannot be reviewed by the courts or the executive [citing 18 Op. A. G. 197; 43 Fed. 17]."

The authority was confined, however, to "questions of interpretation growing out of the execution of the laws" relating to the collection of tonnage tax. The interpretation of treaties may not be included and remained subject to the joint control of the Secretary and the Attorney General in accordance with the Act of June 19, 1878, c. 318, 20 Stat. 171, amending R. S. 2931, until the repeal of the latter by the Customs Administration Act, 1890. See the Government's position in the German treaty cases, *infra*, note 27, p. 34.

Government and the steamship companies and was decided May 21, 1890 by the Circuit Court for the District of New Jersey in *North German Lloyd S. S. Co. v. Hedden*, 43 Fed. 17. The Government regarded the matter as controlled by *Cary v. Curtis* and filed no brief (see *supra*, p. 11.) Counsel for the steamship companies, however, vigorously urged that the statute was invalid (43 Fed. at 20, 23). After trial on the merits and careful consideration, the circuit court agreed that *Cary v. Curtis* was controlling. The court observed (p. 25):

It was perhaps unnecessary, in view of *Cary v. Curtis*, and *Sheldon v. Sill*, that I should have done more than acquiesce in the doctrines there announced, and support the validity of the act of July 5, 1884, without further discussion, but the large amount of money involved in the present actions, and the earnestness and force with which the plaintiff's claims have been pressed, have induced me to make a more extended presentation of them than was a first designed. * * * Neither is the court required to say whether the commissioner of navigation is or is not correct in his interpretation of the law. Congress has seen fit to constitute him the final arbiter in certain disputes, and congress alone can supply a remedy for any wrong which may have arisen from his construction of the law relating to the collection of tonnage due.

Accordingly the court held that any right given by R. S. 2931 to sue for overpayments of tonnage duty was taken away by section 3 of the Act of 1884 and the power to determine controversies arising therefrom given exclusively to the Commissioner of Navigation (now the Director, Bureau of Marine Inspection and Navigation).

The shipping interests acquiesced in this decision and no appeal was ever taken. On the contrary, as pointed out (*supra*, p. 11), Congress by the Customs Administration Act, 1890 (c. 407, 26 Stat. 131), thereupon repealed R. S. 2931, providing for suit against the collector in tonnage tax cases, and established a new procedure which confined judicial review to certain specified situations involving customs duties and excluded tonnage questions.

Indeed, the failure to appeal is not surprising. We know of no objections which can reasonably be raised to the procedure of the remedy provided for collection and refund of tonnage tax. If any there be, they may be answered by reference to the general principles which control any question of due process in the procedural sense. The term "due process" was borrowed from the English "law of the land" (*Davidson v. New Orleans*, 96 U. S. 97, 101 (1877)), and does not necessarily mean judicial process (*Public Clearing House v. Coyne*, 194 U. S. 497, 509 (1904); *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272 (1855)); nor does it mean any particular kind of proceeding (*Insurance Co. v. Glidden Co.*, 284 U. S. 151 (1931)). The due process clause of the fifth and fourteenth amendments merely requires that the federal and state governments shall not deprive one of his property or liberty without such notice and hearing as is commensurate with the necessities of the case and the character of the rights affected. *Buttfield v. Stranahan*, 192 U. S. 470, 496-497 (1904); *United States v. Ju Toy*, 198 U. S. 253 (1905); *Chicago, Burlington &c. R. R. v. Chicago*, 166 U. S. 226 (1897); *Phillips v. Commissioner*, 283 U. S. 589 (1931). Moreover, the Supreme Court has repeatedly held that there is no denial of due process when a state provides only an administrative hearing by which to determine the assessment and amount of taxes due. *Londoner v. Denver*, 210 U. S. 373 (1908); *Pittsburgh Ry. v. Board of Public Works*, 172 U. S. 32 (1898); *Davidson v. New Orleans*, 96 U. S. 97 (1877); *Kelly v. Pittsburgh*, 104 U. S. 78 (1881). The same principle applies here.²⁶

²⁶ See the brilliant discussion of the point by Emmons, Ct. J., in *Pullan v. Kinsinger*, 20 Fed. Cas. No. 11,463 at pp. 48-50. As the court observed in *Cheatham v. United States*, 92 U. S. 85, 88 (1875): "All governments, in all times, have found it necessary to adopt stringent measures for the collection of taxes, and to be rigid in the enforcement of them. These measures are not judicial; nor does the government resort, except in extraordinary cases, to the courts for that purpose." *Auffmordt v. Hedden*, 137 U. S. 310, 324 (1890); *Earnshaw v. United States*, 146 U. S. 60, 69 (1892). Moreover, the Government may prescribe the conditions attending the admission of vessels, goods and immigrants into its ports. Accordingly, as one of those, it may make the decision of an administrative officer final. Cf. *Auffmordt v. Hedden*, *supra*, at 329; *Oceanic S. Navigation Co. v. Stranahan*, 214 U. S. 320, 340 (1909).

The court below, however, refused to follow *Cary v. Curtis*, and *North German Lloyd v. Hedden*. As its justification for disregarding the plain language of section 3 of the Act of 1884 and departing from the principles established by those cases, the court refers to *Laidlaw v. Abraham*, 43 Fed. 297 (1890, C. C. Ore.). That case was an opinion by a trial judge overruling the Government's demurrer to a complaint against the collector under R. S. 2931 for refund of tonnage dues. As we have stated (*supra*, p. 12), the facts of the case were such that when evidence thereof was submitted to the Commissioner of Navigation refund was ordered and the court entered a nonsuit, significantly, with costs against the plaintiff.

The insufficient consideration given the question by the Oregon court is obvious from its opinion. No reference is made to the corresponding provision of R. S. 2930 and the decisions of *Hilton v. Merritt*, 110 U. S. 97, 104 (1884), and *Bartlett v. Kane*, 16 How. 263, 272 (1853), thereunder. No consideration is given to the principles laid down in *Carey v. Curtis* which had been applicable to tonnage tax cases until 1864. The decision in *North German Lloyd v. Hedden*, handed down four months before, is also ignored. The court confines itself to observing (pp. 299-300):

At first blush it may appear that this provision in the act of 1884 repealed so much of sections 2931, 3011, Rev. St., as gives the person paying such illegal tax the right of redress in the courts, after an unsuccessful appeal to the department. * * * In my judgment, the purpose of the provision is to relieve the head of the department from the labor of reviewing the action of the commissioner in these matters, to sidetrack into the bureau of navigation the business of rating vessels for tonnage duties, and deciding questions arising on appeals from the exaction of the same by collectors. The appeal is still taken to the secretary of the treasury, as provided in section 2931, but goes to the commissioner for decision, whose action is "final" in the department, as it would not be but for this provision of the statute. This being so, and nothing appearing to the contrary, it follows that the right of action given to the

unsuccessful appellant in such cases is not taken away
 * * * And, even if it were plain that congress in the passage of this act intended to deprive the plaintiff of all redress in the courts, might he not in good reason claim that the act is so far unconstitutional and void, as being contrary to the fifth amendment, which declares that no person shall be deprived of his "property without due process of law"? The demurrer is overruled.

The court below, however, despite this offhand manner of the Oregon court in disposing of the Government's demurrer and the circumstance that upon proof of the facts alleged plaintiff was plainly entitled to and in fact obtained administrative refund, takes the position (R. 52) that the Government's failure to allow the *Laidlaw* case to proceed to final judgment and, if the judgment were adverse to appeal therefrom, gives rise to an inference that the Government accepted the opinion as overruling the earlier *North German Lloyd* case.²⁷

²⁷ The court below also attempts to find support for this view in the opinion of Attorney General Miller (20 Op. A. G. 368), stating that *Laidlaw v. Abraham* is the only decision holding contrary to his own opinion in 19 Op. A. G. 661 and to that of Attorney General Garland in 18 Op. A. G. 197, that courts as well as Congress may overturn determinations of the Commissioner of Navigation. But this is indubitably correct and it is not understood why by stating that fact Mr. Miller should be taken as implying that his previous opinion was in error and that the courts have such power. Indeed the opinion is specific that congressional action is necessary, although the question was that of the interpretation of a treaty, no suggestion is made that the claimants might resort to the courts.

The files of the Department of Justice disclose that in the next case involving the question, *United States ex rel. Pacific Coast S. S. Co. v. Chamberlain, Commissioner of Navigation*, No. 50, 965 Law, in the Supreme Court of the District of Columbia, the Government relied upon *North German Lloyd v. Hadden*. On demurrer to the defendant's answer to plaintiff's petition for mandamus, Stafford, J., entered a memorandum of opinion on December 4, 1908 as follows: "I am of opinion that the authority of the Commissioner of Navigation in the premises, under section 3 of the act of July 5th, 1884, was exclusive, and his decision final, both as to matters of fact and matters of law, and consequently that this court is without authority to direct his action herein. Accordingly the demurrer to the answer will be overruled and the answer adjudged sufficient." An appeal was taken by the steamship company but was subsequently dismissed.

Since the *Pacific Coast* case, until the case at bar and its two companion cases were filed, no further suits for refund of tonnage tax appear to have

The vice of the decision in *Laidlaw v. Abraham* and of that of the court below alike is found in the view that the grant of power to an administrative authority to decide finally the issues raised in the course of its administration and to interpret with binding effect the laws covering the subject of that administration, is of doubtful constitutionality. Both courts assume that such a grant of power should be regarded as denying the citizen his property without due process of law. Accordingly, both labor to confine the effect of the word "final" to the internal economy of the authority itself. Thus the decision in *Laidlaw v. Abraham* seeks to refine away the words "shall be final" by arguing that the Act of 1884 did not specifically take away the right of suit provided by R. S. 2931. But at the time when Congress had spoken it had never been suggested that R. S. 2930, making the determination of the appraisers final, should be thus read together with R. S. 2931 with the result that the courts might substitute their decisions for that of the appraisers. In R. S. 2931 as in R. S. 2932, Congress provided for an appeal from the collector to the Secretary of the Treasury and authorized suit within a certain time if the Secretary's decision were adverse to the claimant. Those provisions are specific as to the whole procedure, including suit. In section 3 of the Act of 1884, as in R. S. 2930, no provision for suit is included. No more reason exists for implying one in section 3 than in R. S. 2930.

The Act of 1884 created a new bureau and transferred the decision of matters affecting tonnage tax from the Secretary of the Treasury to the Commissioner of Navigation; appeal was to be taken from the collector to the commissioner, not, as theretofore, to the Secretary. Under R. S. 2931 and 2932 Congress provided that the decision of the Secretary "shall be final unless suit shall be brought" within a certain time. Under R. S. 2930 and section 3 of the new law Congress spe-

been instituted except the German treaty cases. The *Sophie Rickmers (Rickmers Rhederi, A. G. v. United States*, 45 F. (2d) 413 (1930, S. D. N. Y.); *Flensburger Dampfercompagnie v. United States*, 73 Ct. Cls. 646, 59 F. (2d) 464 (1932), cert. den., 290 U. S. 632. *Standard Oil Co. v. United States*, 77 Ct. Cls. 205, 2 F. Supp. 922 (1933), cert. den. 290 U. S. 632. As those cases involved the interpretation of treaties and not of laws, there was no place for the operation of section 3 of the Act of 1884. See *supra*, note 25; but cf. 20 Op. A. G. 368, 370; 18 Op. A. G. 197, 199.

cifically says that the decision of the commissioner "shall be final"; in neither section did Congress qualify its declaration by any proviso that suit be brought within a certain time as it did in R. S. 2931 and 2932.

The argument of the *Laidlaw* case is unconvincing for yet another reason. The appeal under section 3 by its express terms is from the collector to the commissioner. If the Oregon court is correct and in addition it is to be regarded as substituting the commissioner for the Secretary in R. S. 2931 and preserving the procedure there prescribed, the result is that there is a further appeal from the decision of the commissioner under section 3 to a second decision by the commissioner, substituted for the Secretary, under R. S. 2931. This would appear to demonstrate the impossibility of such a construction. But whatever the situation at the time the *Laidlaw* case arose, Congress in 1890 repealed R. S. 2931 so that when the instant case came before the court below it would not, as did the court in the *Laidlaw* case, construe section 3 of the Act of 1884 together with R. S. 2931. As 46 U. S. C. 3, section 3 of the Act of 1884 now stands alone and leaves the decision on the administrative appeal subject to no judicial review.

It is submitted, therefore, that this court should follow the decisions in *Cary v. Curtis*, *Hilton v. Merritt*, and *North German Lloyd v. Hedden*, and should disregard the *Laidlaw* case. Not only does the latter stand alone and unsupported by any other known decision, reported or unreported, but the opinion shows that the court was impelled to its conclusion by the belief that otherwise interpreted section 3 would be unconstitutional: a belief which we have seen is plainly erroneous.

2. *The Director's decision if it has warrant in the record and a reasonable basis in law is conclusive on the court.*—The administrative record in this case shows that the proceedings before the Director satisfy the fair hearing requirement. Plaintiff took its administrative appeal and argued on the basis of two prior decisions of the Director that the amount demanded by the collector was excessive and unlawful. The Director issued a reasoned opinion (R. 21-23) which distinguished the cases cited by plaintiff and a copy was duly communicated to plaintiff (R. 43) and no demand was made for a rehearing nor

for oral argument. The district court in its opinion (R. 47) refers to the circumstance that it appears by affidavit of the Director (R. 29) that any party in interest to a matter involving the payment of tonnage taxes may obtain, upon request, an opportunity to present orally before the Director or one of his assistants any statement or argument which he may care to make, but that plaintiff and its representatives were not so advised.²⁸ But this implied objection cannot be raised to the dignity of a challenge for want of due process. It is settled that in the absence of statutory requirement an opportunity for statement of a party's views and contentions is sufficient. *Norwegian Nitrogen Co. v. United States*, 288 U. S. 294, 317 (1933); *Origet v. Hedden*, 155 U. S. 228, 238 (1894); *N. L. R. B. v. Bottany Mills*, 106 F. (2d) 263, 265 (1939, C. C. A. 3).

²⁸ No mention of a right to oral argument nor to rehearing is contained in 46 Code of Fed. Regs. 3.6, the regulation relating to the procedure for refund of tonnage duty. *Infra*, appendix, p. 54. The procedure relating to the collection and refund of tonnage tax was summarized by the staff of the Attorney General's Committee on Administrative Procedure as follows: "When a vessel subject to this tax comes into port, the collector computes the amount of the tax and presents a bill. The vessel is denied clearance until the prescribed amount has been paid. If the vessel's owner or master is aggrieved, he may pay under protest and assert a claim for refund, in which event a letter of protest and a letter of the collector are sent to the Bureau for its decision. Approximately 50 protests are filed annually. A member of the Bureau's staff prepares a draft of a letter to the collector, deciding the case. This letter is reviewed by an Assistant Director and by the Director. Very seldom does either the Assistant Director or the Director make substantial changes in the letter as first drafted. The questions presented are almost invariably questions of statutory interpretation and application of the statutory provisions to the facts of particular cases. Disputes of fact are virtually nonexistent; therefore no opportunity to present evidence is necessary. Furthermore, the nature of the questions is such that argument may be as well presented in writing as orally. The letters of decision present reasons, and opportunity is afforded for supplemental protests, although supplemental protests are very rarely made. The only questionable feature of the present practice with respect to collection of tonnage taxes is the apparent lack of any effective method of reviewing collectors' decisions which are favorable to vessels. Decisions unfavorable to taxpayers are reviewed, and accounts of collections are, of course, audited, but no independent inquiry is made into the question whether or not a collector may have erroneously decided a question of interpretation in favor of a vessel." (S. Doc. 186, 76th Cong., 3d sess., part 10, "Department of Commerce, Bureau of Marine Inspection and Navigation," p. 35).

Plaintiff's dissatisfaction was not with the administrative procedure but with the result thereof. Even there plaintiff's objections are restricted: neither plaintiff nor the court below questions the Director's view of the basic facts in this case. It is common ground to all concerned that the voyage of the *Montebello* was from Southern California to South America to British Columbia and back to Southern California, and that she had shipped her crew on articles for just such a voyage.²⁹ Plaintiff's objection to the Director's decision runs only against his final conclusion of fact, that in the circumstances of the basic facts agreed to by all, the *Montebello* was engaged in the long-voyage trade and entered from Talara, Peru, and not in the short-voyage trade entering from Vancouver, British Columbia.

The court below substituted its decision on the point for that of the Director purely because it had concluded as a matter of law that the finality conferred upon the Director's decision by section 3 of the Act of 1884 was limited to the executive branch of the Government. It correctly held (R. 54) that "Determination of the port from which the *Montebello* originated for the purpose of the tax involved is a question of fact." Plaintiff may urge in this court, however, that, because the basic evidentiary facts are undisputed and the controversy concerns the inference to be drawn from them, the issue is one of law which courts may decide for themselves without regard to the administrative decision. This contention has been advanced in a number of recent cases but it has not found favor with the Supreme Court. *Gray v. Powell*, 314 U. S. 402 (1941); *Shields v. Utah-Idaho R. R. Co.*, 305 U. S. 177 (1938); *United States v. Louisville & N. R. R. Co.*, 235 U. S. 314 (1914). In the latter case the court stated (at 320-321):

²⁹ As the stipulation of agreed facts (R. 39-44) is substantially in accord with the administrative record before the Director (R. 7-29), defendant-appellant's action in acquiescing to the stipulation and failure to insist upon the case being considered only on the administrative record is of no importance. The law is settled, however, that since any review by the court cannot be by a trial *de novo*, only the administrative record should be considered. *Shields v. Utah-Idaho R. R. Co.*, 305 U. S. 177, 185 (1938); *Acker v. United States*, 298 U. S. 426, 434 (1936); *Tagg Bros. v. United States*, 280 U. S. 420, 443-444 (1930).

the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. * * *

It cannot be otherwise since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action.

The view was reaffirmed in *Gray v. Powell* as follows (314 U. S. at 412):

* * * Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director [Citations]. It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action.

The Supreme Court has consistently given effect to the administrative judgment in cases like that now at bar. But it has on various occasions apparently interchangeably labeled the issue as "fact" (*Virginian Ry. v. United States*, 272 U. S. 658, 665 (1926)), "ultimate fact" (*Dobson v. Comm'r*, 320 U. S. 489, 501 (1943)), "ultimate conclusion" or "inference of fact" (*N. L. R. B. v. Hearst Publications*, 322 U. S. 111, 130 (1944)), "factual inferences and conclusions" (*Commissioner v. Scottish American Inv. Co.*, 323 U. S. 119, 124 (1944)), or as a "mixed question of law and fact" (*I. C. C. v. Union Pac. R. R.*, 222 U. S. 541, 547 (1912); cf. *United States v. Idaho*, 298 U. S. 105, 109 (1936); *Dobson v. Comm'r*, 320 U. S. 489, 501 (1943)). More recent pronouncements use the formula of "warrant in the record and a reasonable basis in law" (*N. L. R. B. v. Hearst Publications*, *supra*, at 131) or require that there be "a rational basis" for the administrative conclusion (*Rochester Tel. Corp. v. United States*, 307 U. S. 125, 146 (1939)).

The *Dobson* and *Scottish American* cases indicate that the administrative decision, whether called "factual inferences and conclusions," "ultimate fact" or "mixed," is not to be treated as one of "law" unless "the elements of a decision can be so separated "as to identify a clear-cut mistake of law" (320 U. S. at 502). This approach was adopted in one of the earliest cases involving a dispute as to the precise limits of judicial review. In *Bates & Guild Co. v. Payne*, 194 U. S. 106 (1904), in passing upon a decision of the Postmaster General, the Supreme Court said (p. 108):

* * * where Congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong. * * * where there is a mixed question of law and fact, and the court cannot so separate it as to show clearly where the mistake of law is, the decision of the tribunal to which the law had confided the matter is conclusive.

The different modes of statement, which probably vary with the linguistic preferences of the individual opinion writers, all express this same thought.

The present question of the interpretation of the tonnage statute does not differ from those considered in *Gray v. Powell*, *Shields v. Utah Idaho R. R. Co.*, *Rochester Telephone Corp. v. United States*, and *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251 (1940). See also *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 400 (1940). The issue here is whether on undisputed facts the Director correctly concluded that the Montebello was "entered from" Talara rather than Vancouver. The issue in *Gray v. Powell* was whether on undisputed facts the Director of the Bituminous Coal Division had correctly concluded that a railroad was a "producer" within the meaning of the Bituminous Coal Act; in the *Shields* case whether a railroad was an "interurban" within the meaning of the Railway Labor Act; in the *Rochester Telephone* case whether one

company was under the "control" of another within the meaning of the Communications Act; and in the *South Chicago* case whether an employee was a "member of a crew" within the meaning of the Longshoremen and Harbor Workers Compensation Act.

In each cited case the Supreme Court recognized that the question as to whether particular facts brought a person within statutory language was a matter of judgment and discretion on which the decision of the administrative official was to be accepted, if supported by the record, and that such questions of administrative judgment were not to be treated as pure matters of law for purposes of judicial review. In the *Shields* case the Court declared that the determination as to whether the carrier was "interurban" "was one of fact" (305 U. S. at 181). In the *Rochester Telephone* case the Court declared that whether one company had obtained "control" of another within the meaning of the Communications Act presented "an issue of fact" (307 U. S. at 145). And in the *South Chicago* case the Court refused to treat the issue of whether an employee was a member of a crew as presenting a mere question of law (309 U. S. at 258). In its opinion in the *Sunshine* case the Court, citing the *Shields* case and foreshadowing the *Gray* case, indicated the principle applied to proceedings for exemption under the Coal Act, referring to "the determination of the *question of fact* whether a particular coal producer fell within the Act" (310 U. S. at 400). [Italics supplied.]

The establishment by Congress of an administrative authority with power to determine a particular question manifests a legislative intention to take advantage of the expert judgment of a body "informed by experience" in the designated field. *Tulsidas v. Insular Collector*, 262 U. S. 258, 265 (1923); *N. L. R. B. v. Hearst Publications*, 322 U. S. 111, 130 (1944); *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454 (1907). There is no difference in this respect between the skill of employees in a bureau of a department advising and assisting its director and those in a board or commission. *Gray v. Powell*, 314 U. S. 402, 412 (1941). Decision in the instant case, for example, requires a background knowledge of the manner in which the shipping industry operates

and of the routes and trades customarily worked by tankers. Determination of the port from which the vessel entered within the meaning of the tonnage statute, when in fact the vessel entered from both ports, necessitates an understanding of the dynamics of the shipping industry and an appreciation of the many different ways in which vessels may be operated. In addition to a knowledge of the general purpose of Congress in adopting the tonnage statute it requires an intimate understanding and appreciation of the industrial details which led Congress in 1884 to grant the particular reduction provided and the trained ability necessary to foretell the effect of the imposition here adopted upon the attainment of the congressional objective. It is, in short, a matter in which the "feel of judgment" is important. *Nashville, C. & St. L. Ry. v. Browning*, 310 U. S. 362, 366 (1940). Such a determination, we submit, is one for an expert administrative tribunal equipped to bring together the interrelated fragments of the picture, and not by a court, experienced in the law generally but without intimate grasp of the industrial and economic details which make up the shipping industry and form the background of the tonnage statutes.

For these reasons, when Congress, as it did here, empowers an administrative authority to decide a question finally, it must be assumed that Congress intends that the matter be submitted to the judgment and discretion of a trained group of specialists rather than to a court. Insofar, therefore, as a determination calls for the exercise of judgment and discretion in the interpretation of the statute, the administrative decision should be accepted by the courts irrespective of whether based on facts in evidence or in familiarity with the legislative and practical setting of the statutory provision involved. But this does not mean that the conclusions of an administrative authority are final on one type of question any more than on the other. The determination of the administrative body must have "warrant in the record" and a reasonable basis in the law. *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146 (1939); *N. L. R. B. v. Hearst Publications*, 322 U. S. 111, 131 (1944). Just as an administrative decision which is unsupported by substantial evidence has no rational basis in fact, so an admin-

istrative decision which is plainly unreasonable in the light of express statutory language or other convincing evidence of legislative intention has no foundation in law.³⁰ In either event however, "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Rochester Telephone Corp v. United States*, *supra*, at 146; *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286-287 (1934); *Swayne & Hoyt, Ltd., v. United States*, 300 U. S. 297, 303 (1937); cf. *Gray v. Powell*, 314 U. S. 402, 412 (1941). As the court observed in *Commissioner v. Scottish American Inv. Co.*, 323 U. S. 119, 124 (1944), "The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable." Cf. *Walker v. Altmeyer*, 137 F. (2d) 531, 533-534 (1943, C. C. A. 2).

3. *The Director's decision is supported by evidence in the record and has a reasonable basis in point of law.*—Considered in the light of the economics of the shipping industry there can be no doubt that the Director's decision finds ample warrant in the record. The American shipping trades are divided logically into the coasting trade, the short-voyage trade with the ports of North and Central America (in effect but an international coasting trade), and the long-voyage trade with other foreign ports. Typically a vessel in the short-voyage trade takes cargo out to a port or ports in North or Central America and returns to its home port in a short time. The vessel in the long-voyage trade takes its cargo out to a South American, European, or Asiatic port and is gone for many weeks, perhaps for months. The vessel in the short-voyage trade enters frequently and may be taxed accordingly, the long-voyage vessel enters less frequently and offers fewer oppor-

³⁰ Thus, if the language of the statute or its legislative history manifests a specific legislative intention as applied to a particular state of facts, it would be arbitrary for an administrative body to give the statute a different meaning. But if legislative intention appears only in broad outline without reference to a specific state of facts, there would be legitimate room for administrative discretion in determining how the Act applied in a particular situation.

tunities for taxation. The several rates of taxation under the American tonnage laws are divided accordingly, into the same three classes: the coasting trade is free from tonnage duties (46 U. S. C. 122) and is reserved to vessels of the United States; the foreign trade is subject to taxation: the short-voyage trade at 2 cents per ton, the long-voyage trade at 6 (46 U. S. C. 121). The tax is imposed on a vessel's first entry within a year at a United States port; afterwards she may call at as many other United States ports as she chooses without paying additional tax until she calls at a foreign port.

Obviously so long as a vessel remains within the short-voyage limits she does not expose herself to taxation at the long-voyage rate. But when a vessel engaged in the long-voyage trade calls also at a foreign port of North or Central America before entering a port of the United States, can she claim the benefit of the 2-cent rate granted to vessels in the short-voyage trade? That is the question here. *A priori* one would think not and so the Director decided; correctly we submit. Obviously in such a situation the vessel enters the United States port from both the other ports: from the port within the long-voyage limits, taxable at the 6-cent rate, and from the North or Central American port within the short-voyage limits, taxable at the 2-cent rate. It is not suggested that she should pay tax both at the 6-cent rate, based on entry from the long-voyage port and also at the 2-cent rate based on entry from the short-voyage port or a combined rate of 8 cents.³¹ May she then escape taxation at the long-voyage rate and pay only the short?

If a vessel thus trading to ports in both limits may demand that it be given the benefit of the reduced short-voyage rate although it enjoys the economic benefits of trading to the long-voyage ports, the purpose of the different tonnage rates will be defeated and a bonus will be conferred for carrying goods between North or Central American ports and ports of the United States. If a vessel coming from South American ports and entering at Los Angeles may reduce its tonnage tax from 6 to 2 cents per ton by first calling at a Mexican or Canadian

³¹ Cf. *Trinity House v. Cedar Branch S. S. Owners* (1930, K. B.) 143 L. T. 352, 37 Ll. L. R. 173.

port, while the vessel that calls first at San Diego or San Francisco must pay the 6-cent rate, a preference in freights to the extent of the 4-cent per ton tax benefit will accrue to the nearby foreign port at the cost of other ports of the United States. Certainly this was not intended by Congress.

Let us look at the case presented to the Director for decision in the present matter. It is familiar that the intent and the performance of that intent determine what constitutes a voyage. *Friend v. Gloucester Ins. Co.*, 113 Mass. 326, 332 (1873); cf. *The Circassian*, 2 Wall. 135, 151 (1864). Applying that principle, in no realistic sense can the fact that the *Montebello* last called at Vancouver be considered as putting her in a different position from that of the typical vessel engaged in the long-voyage trade. The intent, as shown by the crew's articles was for a voyage to South America and home. Admittedly she made such a voyage. Indeed the only effect is that the number of times she would enter and be subject to tax each year has been diminished because the addition of the Canadian leg of the voyage makes it take several days longer; it is so much the less a short-voyage entitled to the 6-cent rate. Plaintiffs are simply owners who arrange to work their vessel so that the voyage home in ballast with consequent loss of freight is only from Vancouver to Southern California instead of from a South American port to a California port. The saving of this more efficient operation cannot furnish a ground for a still further saving by a reduction in the tonnage tax from 6 to 2 cents.

In the circumstances disclosed by the conceded facts we believe it manifest that the Director correctly concluded that in fact plaintiff's vessel was not engaged in the short-voyage trade and that entering as she did from both a South American and a Canadian port she was correctly assessed tonnage tax at the single higher rate. Certainly it cannot be said that there is "no rational basis" nor "substantial evidence" for this conclusion of the Director. The court below therefore erred in substituting its opinion for that of the Director.

We submit that the Director's decision is equally well founded in point of law. The Act of August 5, 1909, c. 6, § 36, 36 Stat. 111, now in force (41 U. S. C. 121, *infra*, Appendix, p. 53, provides:

A tonnage duty of 2 cents per ton, not to exceed in the aggregate 10 cents per ton in any one year, is imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands * * * and a duty of 6 cents per ton, not to exceed 30 cents per ton per annum, is imposed at each entry on all vessels which shall be entered in any port of the United States from any other foreign port.

This language was derived from section 14 of the Act of June 26, 1884, c. 121, 23 Stat. 57, entitled "An act to remove certain burdens on the American Merchant Marine and encourage the American foreign-carrying trade." Prior to that Act tonnage tax was imposed upon all vessels of the United States arriving in the United States from foreign ports, at the rate of 30 cents per ton per annum, collected in a lump sum for a year in advance on the occasion of the vessel's first entry. Section 14 of that Act changed the rate and mode of collection as follows:

That in lieu of the tax on tonnage of thirty cents per ton per annum, heretofore imposed by law, a duty of three cents per ton, not to exceed in the aggregate fifteen cents per ton in any one year, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India islands, the Bahama islands, the Bermuda islands, or the Sandwich islands, or Newfoundland; and a duty of six cents per ton, not to exceed thirty cents per ton per annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States from any other foreign ports.³²

³² Section 11 of the Act of June 19, 1886, c. 421, 24 Stat. 81, amended the Act of 1884 so as to extend to all foreign countries the offer for reciprocal abolition of the tonnage tax and lighthouse dues made to North American ports by the Act of 1884. H. Rept. No. 175, 49th Cong., 1st sess., p. 2 [serial vol. 2435]; 17 Cong. Rec. 1108-1109. It is not pertinent here.

The purpose of the Act of 1884 was to place a smaller tax on vessels in the short-voyage trade with Canada and the West Indies, which was largely held by the vessels of the United States, and to end the discrimination against vessels of the United States which resulted from the circumstance that a large portion of our vessels then engaged in the foreign trade were sailing vessels making long voyages and entering our ports not much oftener than once a year while the foreign steamships, taking the cream of our European trade, entered from eight to ten times annually, resulting, practically, in a tax of 30 cents per ton on each entry of vessels of the United States and but 3 cents per ton on each entry of the British steamships.³³

When Congress in 1909 reenacted the tonnage statute without substantial change, other than the reduction of the short-voyage rate from 3 to 2 cents, the statutory language had an established administration construction in the decisions of the Commissioner of Navigation, the predecessor of the present Director. The complications resulting from the omission of the Act of 1884 to deal specifically with the case of vessels entering from a voyage involving calls at both a long-voyage port and a North or Central American short-voyage port, had early presented themselves. The administrative interpretation was definitely established in 1887 by two decisions of the Commissioner. *The Hernan Cortez*, 1887 T. D. No. 8026; *The Marmion*, 1887 T. D. No. 8293.

The case of *The Hernan Cortez* was substantially identical with the case at bar. The vessel had cleared Barcelona, Spain, a 6-cent port, with cargo for Cuba and Puerto Rico only but

³³The Committee Report states: "Under our reciprocal treaties with England and other maritime nations we cannot impose upon British and other foreign vessels engaged in our foreign trade a larger tax than we impose upon ours; but a decent regard for our own ought to lead us to change the mode of assessment from an annual to an entry tax. This is fair, as the tax should be adjusted to entries or voyages which represent business done, rather than time, as the latter inevitably discriminates against sailing vessels. * * * we recommend that it be fixed at 6 cents per ton for the long-voyage foreign trade and 3 cents per ton for the short-voyage trade, in the latter case not to exceed 15 cents per ton per annum. * * * In the short-voyage trade with Canada, the West Indies, Mexico, &c., which is largely held by American vessels, it will reduce the tax materially" (H. Rept. No. 5, 48th Cong., 1st sess., p. 4 [serial vol. 2253]).

with the intention of coming to the United States. She discharged her cargo in the West Indies, then 3-cent ports, and proceeded in ballast to New Orleans. On her entry the collector assessed tonnage tax at the 6-cent rate. The Spanish owners filed a protest through diplomatic channel.³⁴ The commissioner denied refund. The Secretary of the Treasury stated the basis of the decision in a letter of February 3, 1887 to the Secretary of State as follows (1887 T. D. at p. 67):

It has been heretofore held by the Commissioner of Navigation whose decision in such cases is final, under the statute applicable, that when the voyage to the United States actually commenced at a European port, and one of the excepted ports is visited by the vessel, such visit constitutes merely an incident in the voyage from Europe, and that entry must be made as from a European port. Such was the decision in the case of the British steamship "Cella," which arrived from Shields, England, *via* Halifax, bringing no cargo from the port last named, and in fact carrying none to said port from Shields. She entered at Halifax, and cleared therefrom, and on her arrival in the United States was charged with tonnage at the rate of 6 cents per ton.

Other similar decisions have been made, and it is considered that the ruling is in accordance with the terms of the statute, and that any other course would afford opportunities for an evasion of the law imposing the higher rate of duties. The regulation is applicable not only to Spanish vessels, but to British and all other foreign vessels, and also to vessels of the United States. Of course, if the vessel, instead of constituting a part of a line plying between Spain and the United States *via* certain foreign ports, had traded directly between a West Indian port and the United States, the lower rate of tax only would have been levied.³⁵

³⁴ The diplomatic correspondence is published in 1887 U. S. Foreign Relations, pp. 1023-1026.

³⁵ *The Cella*, 1885 T. D. No. 6787, was followed by *The Manitoban*, 1885 T. D. No. 6832. There the vessel cleared from 6-cent ports with cargo and passengers for both. She entered and cleared at Halifax, then a 3-cent port, and on entry at Philadelphia was assessed at the 6-cent rate. The commissioner denied refund. Cf. *The Craighill*, 1885 T. D. No. 6729.

In the case of *The Marmion*, the vessel cleared from Glasgow, a 6-cent port, intending to come to the United States. She proceeded to Port Cortez in the West Indies, then a 3-cent port, there loaded cargo and cleared for New Orleans. The collector at New Orleans applied the 6-cent rate and the commissioner denied refund, observing (1887 T. D. at p. 320):

* * * you find that the master cleared her from Glasgow, Scotland, intending to come to the United States, and, in pursuance of the charter, proceeded to Port Cortez and loaded cargo for New Orleans, she being entered as having arrived from Glasgow. It appears that she was chartered in that city by a firm in New Orleans to engage in the tropical-fruit trade, between New Orleans and Central American ports, for a period of six months, and with a view to her purchase should she be found suitable.

Had the vessel proceeded directly to your port from the European port, she would have been subject to dues at the rate assessed, and, she being destined to the United States, it is not considered that the law intended she should be put on any better footing as to the tax on tonnage by coming via a port in the West Indies, or be entitled to the privileges accorded vessels engaged in the direct trade between the West Indies and the United States.

It was thus settled that where a vessel enters from a voyage from both a long-voyage port and a short-voyage port, the long-voyage rate applies whether she comes in ballast to the short-voyage port and there takes cargo (*The Marmion*), comes with cargo to the short-voyage port, discharges and proceeds in ballast (*The Hernan Cortez*) comes in ballast all the way despite entering and clearing at the short-voyage port (*The Ceila*) or comes with cargo, some unladen at the short-voyage port and the rest at the United States port (*The Manitoban*).

Meanwhile the converse situation was presented of the taxation of vessels entering from a voyage the point of origin which was a port with which dues had been abolished on a basis of reciprocity under the amendment of 1886, but which included

an intermediate call at a taxable port. The commissioner, consistently with his decisions in the other situation, held that the highest of the two applicable rates should be assessed. Because of the international aspect of the matter President Cleveland, on January 14, 1889, transmitted to the Congress a letter from the Secretary of State inviting attention to the difficulties with which the commissioner was confronted in both types of situation and suggesting that Congress should clarify the act. The Secretary explained:³⁶

But in each case the vessel is required in effect to pay the highest rate, without reference to the amount of cargo obtained at the various ports from which she comes. Thus a penalty may practically be imposed in many cases on indirect voyages. ¹

It is conceived that in many instances the main purpose of the act may be defeated by these rulings, but it must be admitted that the law contains no provision to meet such cases, and that there would be great difficulty in the executive branch of the Government undertaking to decide that any particular measure of deflection from a direct voyage should or should not determine its character. This appears to be a proper subject for the consideration of Congress.

But the undersigned has the honor to submit whether it would not at least be practicable in the case of vessels coming from two or more ports as to which different rates of tonnage dues are imposed in the United States, to apportion such dues on the basis of the relative portions of cargo brought from such ports.

But Congress took no action other than to reenact the provision in 1909 with the short-voyage rate further reduced from 3 to 2 cents³⁷ and the commissioner continued to follow his decisions of 1885 to 1888.³⁸

³⁶ H. Ex. Doc. No. 74, 50th Cong., 2d sess., pp. 7-8 [serial vol. 2651]; 1888 U. S. For. Rel. II, p. 1863.

³⁷ Act of August 5, 1909, c. 6, § 36, 36 Stat. 111 *infra*, appendix, p. 52; see 44 Cong. Rec. 4161.

³⁸ With respect to cases of calling at an intermediate port with a higher rate, see 1890 T. D. 10,379 pursuant to 190 p. A. G. 128; 1891 T. D. No. 11,949;

It is fundamental that statutes are to be construed in the light of the purposes sought to be achieved and the evils sought to be remedied (*United States v. Dickerson*, 310 U. S. 554, 561-562 (1940); *United States v. American Trucking Ass'n*, 310 U. S. 534, 542-543 (1940) and cases cited) and that in re-enacting a statute Congress sanctions its settled administrative interpretation (*United States v. Cerecedo Hermanos y Cia.*, 209 U. S. 337, 339 (1908); *Massachusetts Mut. Life Ins Co. v. United States*, 288 U. S. 269 273 (1933); *Costanzo v. Tillinghast*, 287 U. S. 341, 345 (1932). Since the original provision was a remedial one designed to favor the typical short-voyage trade, its provisions are to be reasonably construed so as not to conflict with its basic objectives. Cf. *Harrison v. Northern Trust Co.*, 317 U. S. 476, 479 (1923). It is submitted therefore that the decision of the Director was in accordance with the settled interpretation of his predecessors and is well founded in point of law as well as fully supported in the record and must be accepted by the courts.

III. In the circumstances of this case the six-cent rate alone correctly applies

For the reasons set out above (pp. 43-50) we submit that even if it be held that suit will lie against the collector and that the decision of the Director is subject to review and modification by the court, in the circumstances of the present case it is clear beyond any question that the *Montebello* entered from both Talara, Peru, and Vancouver, B. C. and the higher, or 6-cent rate, applies.

The view of the court below that "a vessel enters the United States from that foreign port from which she last cleared" is plainly contrary to the ordinary meaning of the term in the context here involved. It is obvious that on her return to the United States a vessel of the United States "enters from" all of

1893 T. D. No. 14,531. With respect to cases of calling an an intermediate port with a lower rate, see 1895, T. D. No. 15, 741 and No. 15,889, 25 Op. A. G. 157.1. Since 1895 few decisions on tonnage have been published and none of substantial significance. With the transfer of the Bureau to the Department of Commerce and Labor in 1903 publication ceased and has not been resumed. The same principles, however, are followed as before.

the foreign ports at which she has called since her voyage out was completed and her home voyage began. The question of the rate of tonnage tax which Congress intended should be applied depends in essence upon the character of the voyage. A vessel returning from a voyage within the short-voyage limits of North and Central America is to be taxed at the 2-cent rate. A vessel returning from a voyage extending into the long-voyage limits—as to South America—is to be taxed at the 6-cent rate. Here it is undeniable that the voyage of the *Montebello* was to South America and back and was not within the short-voyage limits which Congress intended to be taxed at the 2-cent rate.

It is accordingly submitted that in any view of the case the judgment of the court below was erroneous and should be reversed.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed and the case remanded with instructions to enter judgment in favor of the defendant collector.

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MARCH 1945.

APPENDIX

Act of August 5, 1909, c. 6, §36, 36 Stat. 111 (46 U. S. C. (1940) 121), provides:

A tonnage duty of 2 cents per ton, not to exceed in the aggregate 10 cents per ton in any one year, is imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Burmuda Islands, or the coast of South America bordering on the Caribbean Sea, or Newfoundland, and a duty of 6 cents per ton, not to exceed 30 cents per ton per annum, is imposed at each entry on all vessels which shall be entered in any port of the United States from any other foreign port, not, however, to include vessels in distress or not engaged in trade.

Act of July 5, 1884, c. 221, § 3, 23 Stat. 119, as amended (46 U. S. C. (1940) 3), provides:

The Director of the Bureau of Marine Inspection and Navigation shall be charged with the supervision of the laws relating to the admeasurement of vessels, and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final.

Act of June 26, 1884, c. 121, § 26, 23 Stat. 59, as amended (18 U. S. C. (1940) 643), provides:

Whenever any fine, penalty, forfeiture, exaction, or charge arising under the laws relating to vessels or sea-

men has been paid to any collector of customs or consular officer, and application has been made within one year from such payment for the refunding or remission of the same, the Secretary of Commerce, if on investigation he finds that such fine, penalty, forfeiture, exaction, or charge was illegally, improperly, or excessively imposed, shall have the power, either before or after the same has been covered into the Treasury, to refund so much of such fine, penalty, forfeiture, exaction, or charge as he may think proper, from any moneys in the Treasury not otherwise appropriated.

Regulations for documentation, entrance and clearance of vessels, tonnage duties and light money, etc., Secretary of Commerce and Director of the Bureau of Marine Inspection and Navigation, May 28, 1938, Part 3, § 6 (46 Code of Fed. Regs. 3.6), provide:

(a) On account of the expense and difficulty of obtaining a refund of money excessively or erroneously collected, customs officers are instructed to place in special deposit, if such course is practicable, money collected under protest or where there is reason to believe that application for refund will be made immediately.

(b) If, however, it is found necessary to deposit collections to the credit of the Treasurer of the United States on account of fiscal regulations, or for any other reason, and refund is asked, collectors may notify the payor to prepare an application requesting refund of the amount which he alleges was excessively or erroneously collected. In the preparation of this application the following instructions will be observed:

(1) The application must be in duplicate, each signed, addressed to the Director of the Bureau of Marine Inspection and Navigation, and submitted through the collector of customs.

(2) It must be a direct request for the refund of a definite sum, showing concisely the reasons therefor, the nationality, rig, and name of the vessel, and the date, place, and amount of each payment for which refund is

asked. A protest against a payment will not be accepted as an application for its refund.

(3) It must be made within 1 year from date of the payment. A protest against a payment will not alone be sufficient to bring a claim within the statute.

(4) The application and its duplicate should be forwarded to the Director of the Bureau of Marine Inspection and Navigation by the collector of customs after all statements which are of record in his district have been verified, and with such comments as he may choose to make.

(5) A certified statement, also in duplicate (Commerce Form 1086), should be carefully prepared and forwarded to the Director of the Bureau of Marine Inspection and Navigation after the collector has been so authorized. In preparing this statement the collector should bear in mind that it must be signed by the owner or charterer of the vessel, whose name and address must be given in every instance as the payee, even when the money to be refunded had been paid by an agent or representative, as the Comptroller General has held that such payor must look to his principal for repayment.



No. 10,931

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

WILLIAM JENNINGS BRYAN, JR., individually
and as Collector of Customs for the Port
of Los Angeles, Customs Collection Dis-
trict No. 27,

Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA
(a corporation),

Appellee.

On Appeal from the District Court of the United States for the
Southern District of California, Central Division.

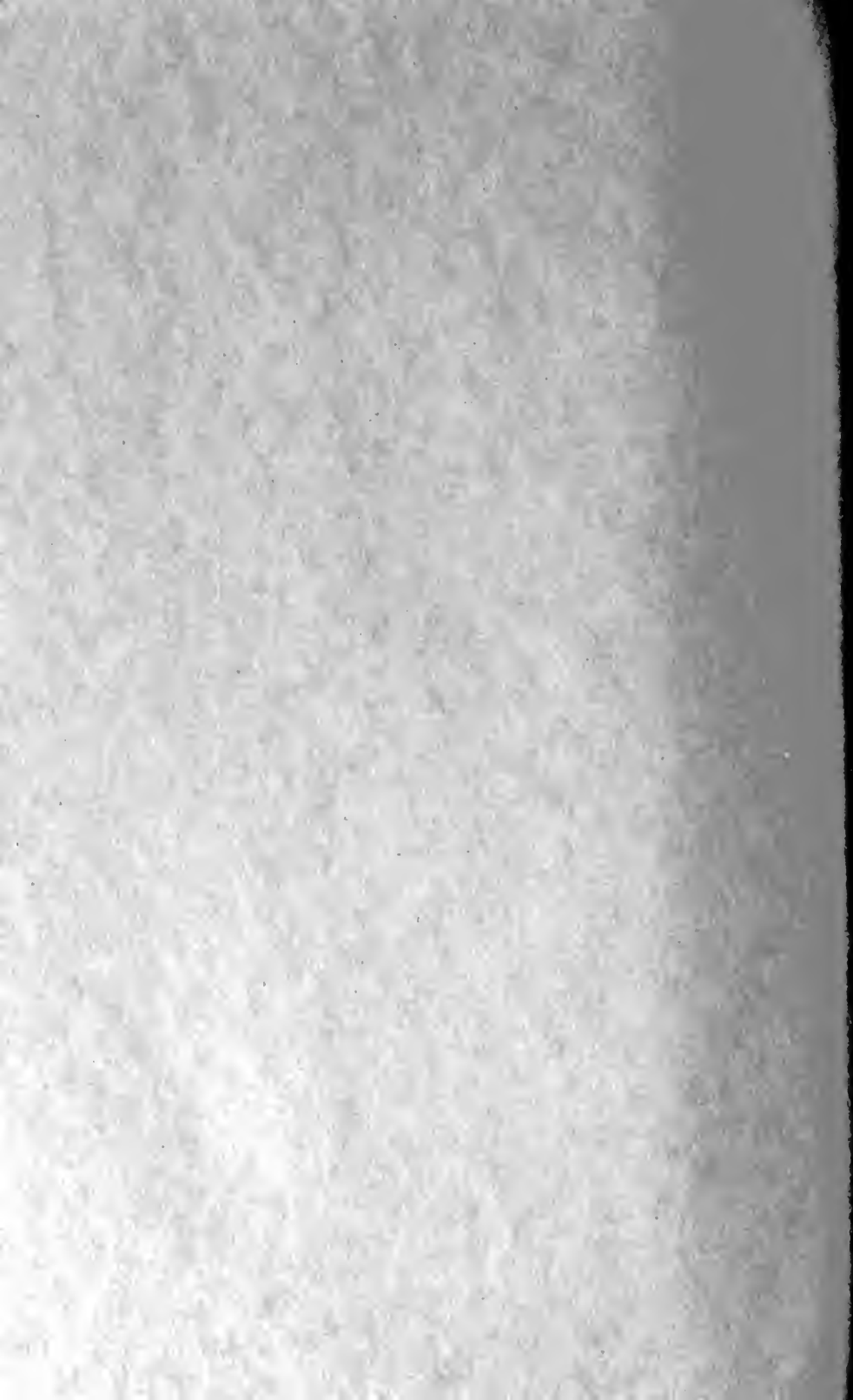
BRIEF FOR APPELLEE.

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FILED

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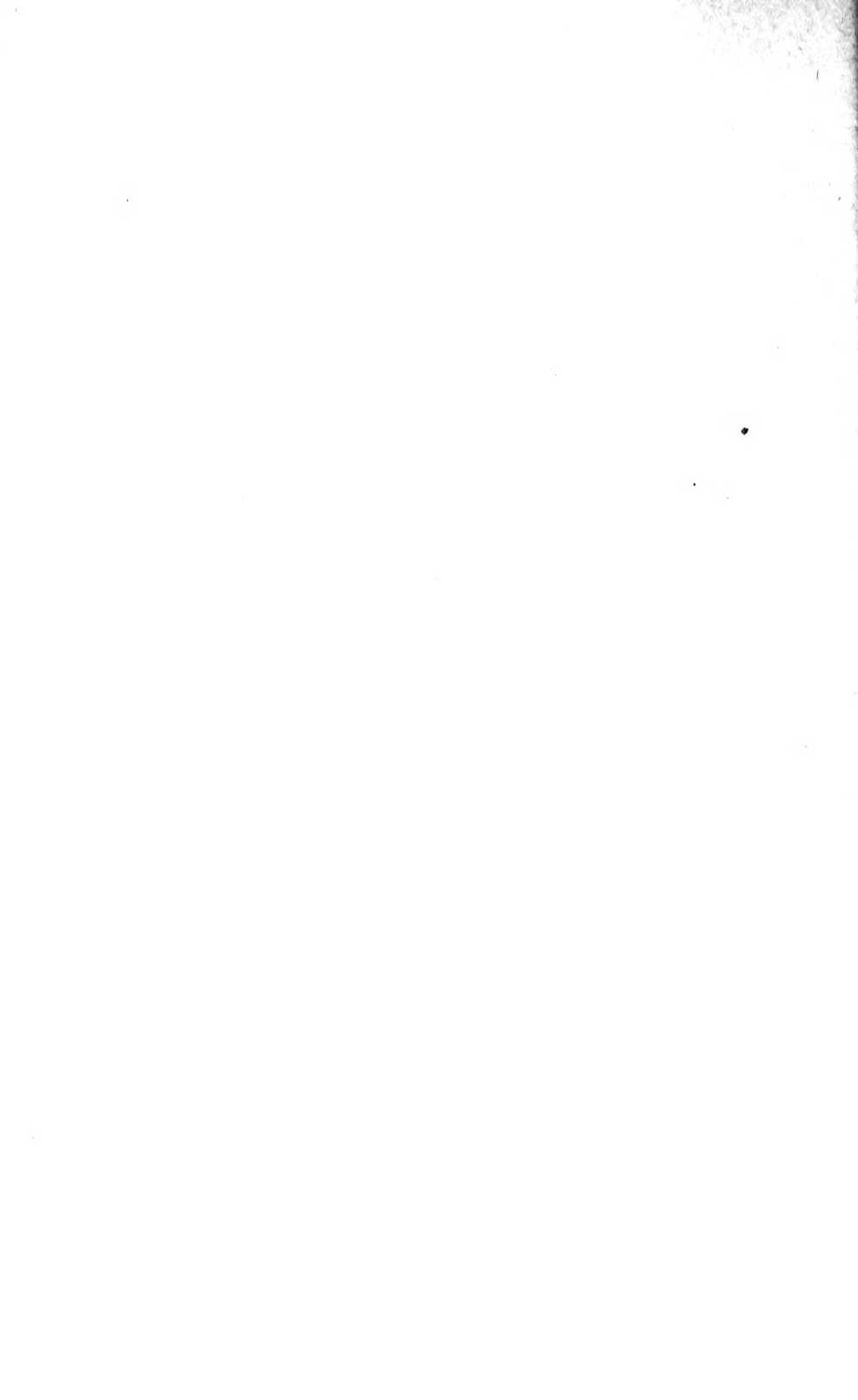
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No. 10,931

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM JENNINGS BRYAN, JR., individually
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Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA
(a corporation),

Appellee.

On Appeal from the District Court of the United States for the
Southern District of California, Central Division.

BRIEF FOR APPELLEE.

OPINION BELOW.

The opinion of the United States District Court for the Southern District of California, Honorable J. F. T. O'Connor, District Judge, is reported at 52 F. Supp. 256, 1944 A.M.C. 829.

JURISDICTION.

This is an appeal from a final judgment for the plaintiff entered by the United States District Court for the Southern District of California, Central Division, in a civil action by the Union Oil Company of California against William Jennings Bryan, Jr., individually and as Collector of Customs for the Port of Los Angeles, Customs Collection District No. 27, to recover tonnage tax assessed and paid upon plaintiff's vessel the S.S. *Montebello*.

STATEMENT OF THE CASE.

The brief for the appellant has set out the statement of the case. To the facts set out therein, we wish to call the Court's attention to the following:

That on January 25, 1939, the Director decided an application for refund of tonnage taxes in favor of the M/S *Ontariolite* and on February 24, 1938, the Director had decided an application in favor of the *Rotterdam*. (Fdgs. 20, 21, R. 65.) That the Panamanian S.S. *Santa Maria* was permitted to enter at the Port of San Francisco and pay tonnage tax at the rate of 2 cents per ton, having completed a voyage similar to the voyage of the *Montebello*. (Fdgs. 23, R. 66.)

SUMMARY OF ARGUMENTS.**I.**

The Collector of Customs may be sued in the District Court for the recovery of tonnage taxes illegally collected. The common law right of suit against the Collector of Customs in matters other than customs matters has not been changed by statutory enactment.

The collector's refusal to accept a master's oath on entry showing the vessel as being entered from Vancouver, B. C., Canada, constituted compulsion and in cases of compulsion no payment under protest is necessary.

II.

The District Court has jurisdiction of a controversy involving the assessment and collection of tonnage taxes. The Act of 1884 does not limit nor deprive the District Court of jurisdiction. The Act was a re-organization measure and it was not intended to affect the jurisdiction of the Court. The District Courts are specifically granted jurisdiction of tonnage tax cases.

III.

The tonnage taxes were improperly assessed. The *Montebello* entered Port San Luis from Vancouver, B. C., from whence she had cleared. She had *entered Vancouver* from Talara, Peru.

ARGUMENT.**I. SUIT WILL LIE AGAINST THE COLLECTOR OF CUSTOMS TO RECOVER THE AMOUNT OF TONNAGE TAX ERRONEOUSLY ASSESSED.**

It is alleged in appellant's brief: first, that statutory authority for a suit against the collector existed only between 1864 and 1890, and no longer exists. (Brief, page 10); and second, that no right of action exists at common law against the collector under the circumstances of this case.

Appellee's position has always been that its right of action was the common law right. We therefore can dispense with the first part of appellant's first argument.

Appellee respectfully submits that such a right of action against the collector exists at common law. *De Lima v. Bidwell*, 182 U. S. 1 (1901); *Ogden v. Maxwell*, 3 Blatchf. 319, Federal Case No. 10,458 (18 Fed. Cases p. 613); *Cosulich Line of Trieste v. Elting*, 40 F. (2d) 220 (1930 C.C.A. 2); *Border Line Transportation Co. v. Haas*, 128 F. (2d) 192 (1942 C.C.A. 9).

Appellant has sought to distinguish the situation in the cases cited from that existing in the present case and in the course of his considerable discussion has brought in rules of law, decisions and statutes covering customs matters. While appellee does not believe that this Honorable Court will be confused by this discussion, appellee desires to point out that customs matters are a field apart. Congress has through the years gradually established a special

tribunal and special procedure to cover the customs field. Where the Collector of Customs acts in matters within the sphere of the tariff laws and the Customs Administrative acts, then the relief, if any, of the taxpayer is statutory. 17 *Corpus Juris*, 642 ff.

The appellee is making no claims under the tariff statutes. However, since it is the Collector of Customs that is being sued, the question arises immediately whether he is being sued under the customs laws or not. *In re Fassett*, 142 U. S. 479 (1892); *De Lima v. Bidwell*, 182 U. S. 1 (1901).

In *De Lima v. Bidwell*, 182 U. S. 1, the Court pointed this out (at pp. 176-177):

Conceding, then, that Section 3011 has been repealed, and that no remedy exists under the customs administrative act, does it follow that no action whatever will lie? If there be an admitted wrong, the courts will look far to supply an adequate remedy. If an action lay at common law, the repeal of Sections 2931 and 3011, regulating proceedings in customs cases (that is, turning upon the classification of merchandise), to make way for another proceeding before the board of general appraisers in the same class of cases, did not destroy any right of action that might have existed as to other than customs cases; and the fact that by Section 25 no collector shall be liable "for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise," or any other matter which the importer might have brought before the board of

general appraisers, does not restrict the right which the owner of the merchandise might have against the collector in cases not falling within the customs administrative act.

However, appellant seeks to evade the effect of these cases on the grounds that payment by appellee was not under protest. (The first time the question of protest was raised is in appellant's brief.) Appellant supports his position by the citation of *Elliott v. Swartout*, 10 Pet. 137 (1836). The *Elliott* case recognizes an exception where suit may lie even though no protest be filed. The Court points out this exception or distinction as follows (at pp. 156-157):

But the distinction taken in the case of *Ripley v. Gelston*, is recognized and adopted; that the cases which exempt an agent when the money is paid over to his principal without notice, do not apply to cases where the money is paid by compulsion or extorted as a condition * * *

The *Ripley* case, as the Court points out, is a suit against a collector to recover back a sum of money demanded by him for the clearance of a vessel. In order to get the clearance, the money was paid. In the instant case, the master of the *Montebello* when he arrived at Port San Luis tried to file a master's oath showing the *Montebello* as arriving from Vancouver, Canada. The deputy collector refused to accept such an oath. (Fdg. 12, R. 63.) The master had little choice but to comply. The master was faced with the alternative of accepting the collector's interpretation or placing his vessel, worth many hun-

dreds of thousands of dollars, in jeopardy of forfeiture for the mere two or three hundred dollars involved in the tonnage tax dispute.

In *Ogden v. Maxwell*, Fed. Case 10,458, 18 Fed. Cas. 613, the Court held that no protest was necessary. In that case, the collector issued a permit to land the baggage of the steerage passengers but charged at the rate of 20 cents for each five passengers.

II. THE DETERMINATION OF THE DIRECTOR IS NOT FINAL AND CONCLUSIVE. THE ACT OF 1884 DID NOT DEPRIVE THE COURTS OF JURISDICTION; THE JUDICIARY ACT SPECIFICALLY GIVES JURISDICTION TO THE DISTRICT COURT.

Appellant argues that the Act of July 5, 1884 (23 Stat. 119, 46 U. S. C. A. 3) makes the decision of the Commissioner of Navigation (now Director of the Bureau of Marine Inspection and Navigation) final.

In his discussion of this phase of the case, the appellant has again confused customs jurisprudence with tonnage tax matters and proceedings under statutory authority with actions at common law. We will attempt to follow appellant's arguments in order.

In his preliminary statement of his argument, appellant states his objection to appellee's method in pursuing its remedies; appellant argues (Brief, p. 25) that appellee in its complaint did not seek review of the Director's decision. He seeks to buttress his implication that this denied appellee any relief on the grounds that in the *North German Lloyd (North*

German Lloyd S.S. Co. v. Hedden, 43 Fed. 17) and *Laidlaw (Laidlaw v. Abraham*, 43 Fed. 297) the plaintiff expressly sought review of the Director's decision. What appellant overlooks is that these cases were brought under a statute (R. S. 2931) giving a right of action against the collector which statute was later repealed, whereas the instant case is based on the common law right of suit against the collector, which was reinstated by repeal of the statute. (*De Lima v. Bidwell*, 182 U. S. 1.)

Secondly, appellant's claim that *Cary v. Curtis*, 3 How. 236 (1845), established that the Court had no jurisdiction again confuses the situation applicable to customs jurisprudence. In the first place, *Cary v. Curtis* had reference to the actions involving customs duties, and Congress with reference to customs matters immediately passed the Act of February 26, 1845, 5 Stat. 727, restoring a right of action as to customs matters. In the second place, the Supreme Court in *De Lima v. Bidwell*, 182 U. S. 1, explains that *Cary v. Curtis* and similar cases,

“dealt only with imported merchandise and with the duties collected thereon, and have no reference whatever to exactions made by a collector, under color of the revenue laws, upon goods which have never been imported at all. With respect to these the collector stands as if, under color of his office, he has seized a ship or its equipment, or any other article not comprehended within the scope of the tariff laws * * *

The fact that the collector may have deposited the money in the Treasury is no bar to a judgment against him * * *”

Finally, the argument resolves itself as to which of the two decisions interpreting the Act of 1884 is to be followed, *North German Lloyd Steamship Co. v. Hedden*, 43 Fed. 17 (May 21, 1890) or *Laidlaw v. Abraham*, 43 Fed. 297 (August 18, 1890).

Appellee respectfully submits that:

(1) The *Laidlaw* decision is entitled to more weight.

(2) The considered opinion of the executive branch was that the Courts have jurisdiction.

(3) Congress did not intend to deprive the Courts of jurisdiction.

1.

The North German Lloyd case versus the Laidlaw case.

In the *North German Lloyd* case the Court raised the question of jurisdiction, *sua sponte*, the Court remarking as to defendant's counsel's failure to even brief the question of jurisdiction (at pp. 23-4):

* * * on the other hand, the labor and responsibility of the court have been increased by the omission of defendant's counsel to furnish any assistance towards the solution of the questions and permitting them to pass *sub silentio*.

We call attention to this for two reasons, first because it indicates that the Government, through its executive department, considered the Court had jurisdiction, and secondly because the Court did not consider the full background of the Act, that is, that Congress may have merely intended the finality of the Commissioner's decision should relate to the internal

workings of the Department, inasmuch as the entire Act related to a reorganization of the Bureau of Navigation within the Treasury Department.

If the Court had considered the intent of Congress, its decision would be entitled to greater weight. Likewise, the Government's failure to object to the jurisdiction of the Court is a mirror of the fact that at that time the Government, to-wit, the Executive Department, believed the Court to have jurisdiction. This is borne out by the fact that in an opinion rendered June 12, 1885, the Attorney General ruled (18 Op. Atty. Genl. 197) that the act in question was *designed* to terminate the right of appellate review formerly existing in the Secretary of the Treasury and the Department of State.

However, the objections that can be urged against the *North German Lloyd* decision cannot be urged against the *Laidlaw* decision. In the latter case, the decision was rendered only after a second demurrer and constituted a reversal of its previous decision. The question of jurisdiction was directly presented to the Court and the intent of Congress considered. How well can best be judged from the language of the Court (pp. 299-300):

The only other point made in support of the demurrer is that the decision on the appeal to the Secretary was, under the Act of July 5, 1884 (23 St. 118), in fact made by the Commissioner of Navigation, and is by said act made final, and is therefore a bar to this action.

This act is entitled "An act to constitute a Bureau of Navigation in the treasury depart-

ment". The commissioner created by it is charged, "under the direction of the secretary of the treasury" with many duties concerning "the commercial, marine, and merchant seaman of the United States;" and, by section 3 thereof, "with the supervision of the laws relating to the admeasurement of vessels and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final."

At first blush it may appear that this provision in the act of 1884 repealed so much of sections 2391, 3011, Rev. St. as gives the person paying such illegal tax the right of redress in the courts, after an unsuccessful appeal to the department.

But, on reflection, I am satisfied that the word "final" is used in this connection with reference to the department, of which the commissioner is generally a subordinate part.

In my judgment, the purpose of the provision is to relieve the head of the department from the labor of reviewing the action of the commissioner in these matters, to side track into the bureau of navigation the business of rating vessels for tonnage duties, and deciding questions arising from appeals from the exaction of the same by collectors.

The appeal is still taken to the secretary of the treasury, as provided in section 2931, but goes to the commissioner for decision, whose action is

“final” in the department, as it would not be but for this provision.

This being so, and nothing appearing to the contrary, it follows that the right of action given to the unsuccessful appellant in such cases is not taken away.

The appeal to the department has simply been decided by the commissioner, rather than the secretary, and, that having been adverse to the plaintiff, his right of action against the collector attaches at once.

That the decision was brought to the notice of the Attorney General’s office is seen in the extensive quotations contained in 20 Op. Atty. Gen. 367, wherein the *Laidlaw* case is cited as an authority on the subject, and no mention is made of the *North German Lloyd* case. Certainly this connotes acquiescence in the *Laidlaw* decision.

The *Laidlaw* case is accepted by the leading authorities as representing the law. In Corpus Juris, Vol. 58, section 27, at page 39, we find the following:

Remedies of person charged with, or liable for, Tax or Duties: A person from whom tonnage or light duties have wrongfully been exacted may recover back by action, from Collector of Customs, the amount so wrongfully exacted, notwithstanding certain remedies in the Treasury Department which may be pursued under statute.

Cited as authority is the *Laidlaw* case.

In the annotations of the United States Code Annotated, the *North German Lloyd* case is merely

quoted as to the constitutionality of the act, whereas the *Laidlaw* case is quoted as to jurisdiction of the courts. (46 U.S.C.A., Section 3, Notes to Decisions.)

Moreover, in two recent cases before the District Court, *Tanker Corp. v. Bryan*, 1338 BH, and *British Ministry of Shipping v. Bryan*, 1337 B, the question of jurisdiction was not raised by the Government at the trial. This issue was raised on appeal only after the issue was raised in this case. (Appeals Nos. 10,017 and 10,018.)

If thereafter, any doubt as to the true state of the law exists, such doubt should be resolved in favor of the taxpayer. *Lawder v. Stone*, 187 U.S. 281; *Crooks v. Harrelson*, 282 U.S. 55; *Ross v. Fuller*, 17 Fed. 224.

As the instant case is the first case in which this question has apparently been raised since 1895, the long-continued acquiescence by the Government should foreclose it from raising the issue anew.

All other things being equal the Laidlaw case should be given preference as a precedent.

The *Laidlaw* case, being of a later date, is entitled to preference. In Black's *Law of Judicial Precedents*, Hornbook Series, Section 30, it is stated (p. 94):

In the case of two precedents on the same question, which are theoretically of equal authority, but are discordant and irreconcilable, the general rule is to follow the later rather than the earlier of them.

Harper v. Charlesworth, 4 Barn. & Co. 589;

Allen's Estates, 109 Pa. 489, 1 Atl. 82.

The *Laidlaw* case is entitled to preference as a precedent since the question of jurisdiction was directly raised by demurrer, and therefore presumably exhaustively argued by counsel and maturely considered by the Court; whereas, in the *North German Lloyd* case the issue was raised by the Court as an incident to a trial on the merits, and the question was not even briefed by the Government. In *Black*, supra, section 37, it is stated (p. 107):

The authority of a precedent is greatly increased by the fact that the case was exhaustively argued by counsel and fully and maturely considered by the court; and, on the other hand it is diminished by the fact that the case was submitted without argument or on scanty or insufficient argument.

In the *Laidlaw* case, the question was decided after a reargument and a reconsideration of the case, the Court changing its opinion in the same case (see 42 Fed. 401). In *Black*, supra, section 37, it is stated (pp. 108-109):

And moreover, the importance of a decision is augmented by the fact that it was not rendered until after a reargument or reconsideration of the case.

Corton v. Falkner, 4 Durn. & E. 568;

Chicago etc. Ry. Co. v. Van Cleve, 52 Kan. 665,
33 Pac. 472.

* * * * *

Also it is to be noted that when a court changes its opinion in the same case, the later decision is entitled to additional respect from the fact that

it evidences a more careful and mature deliberation given to the case, and therefore more likely to be satisfactory in the thoroughness and soundness of its reasoning. Thus it is said in an English case: "Lord B's judgment in *Lawson v. Lawson* [4 B.P.C. 21] is entitled to the greater weight, because, when the point first came before him, he entertained a different opinion."

Wilkinson v. Atkinson, 1 Turn. & R. 257.

The taking of jurisdiction by the Court in no way prejudices the rights of the Government. If the Director was correct in his decision, the Court will so find. If, however, he was not correct, the appellee would be forever barred from a recovery, if the Court failed to take jurisdiction. In *Black*, supra, p. 321, it is stated that Courts will refuse to follow a precedent which would create a situation resulting in the denial of a legal remedy. See also *Kinney v. Connant*, 166 Fed. 720, 92 C.C.A. 410.

Moreover, the *Laidlaw* case presents a more reasonable view of the Congressional intention, as shown by legislative action in 1911 and further discussed infra.

2.

The considered opinion of the Executive Branch was that the Courts have jurisdiction.

The failure of the Government to raise any question of jurisdiction in the *North German Lloyd* case indicates it acquiesced in the jurisdiction of the Court. This was in keeping with the opinion of the Attorney General on June 12, 1885 (18 Op. Atty. Gen. 197) that

the Act terminates the right of appeal to the Secretary of the Treasury and the Department of State. Moreover, on March 23, 1892, the Attorney General in an opinion as to the President's power to reverse a decision of the commissioner (20 Op. Atty. Genl. 367), advised the President of the *Laidlaw* case, and of its decision that the appellant had the right to bring action in the Courts but pointed out that the President did not have the power to reverse such a decision.

3.

Congress did not intend to deprive the Courts of jurisdiction.

Prior to the enactment of the Act of July 5, 1884, an appeal could be taken to the Secretary of the Treasury for a refund of tonnage tax (Act of June 30, 1864), and to the Department of State upon the interpretation of treaties involving the collection of said tax.

The Act of July 5, 1884, it is admitted was a re-organization measure. Its author, Representative Dingley, stated as to its purposes (Vol. 15, Congressional Record, Part 4):

It constitutes in the Treasury Department a bureau of navigation, or practically consolidates the duties that are now performed by divers officers in that Department so as to bring them into one bureau under one efficient head similar in its general functions to the British board of trade * * * with this divided responsibility, as stated by the Secretary of the Treasury in his last report, there is no official under our government who feels charged with the administration and the care of the laws relating to the merchant marine of the country.

Moreover, all the shipping interests joined in the request for enactment, something they would not likely do if it took from them the right to appeal to the Courts. Moreover, the remarks about bureaucrats and the dangers of bureaucracy by even the proponents of the measure indicate that Congress did not intend to deprive the Courts of jurisdiction. It merely sought to create an orderly system to make some one responsible and to make him the last resort as far as administrative appeals were concerned. In the past, there were many who could rule and many to whom appeals could be taken. It made for chaos, confusion, and uncertainty. Now the new system would establish as far as the administrative branch was concerned, one head, whose decision could not be reviewed by the Secretary of the Treasury, the Secretary of State, the General Accounting Office or the Comptroller General.

Finally, it must be remembered that Congress (which is presumed to know of prior judicial decisions) is presumed to know of the *North German Lloyd* and *Laidlaw* decisions at the time of its codification of the laws relating to the judiciary. In the Act of March 3, 1911, c. 231, sec. 24, par. 5, Congress provided:

The district courts shall have original jurisdiction as follows:

* * * * *

Fifth. * * * of all cases arising * * * from revenue from * * * tonnage. * * *

If Congress did not intend that the District Courts should have jurisdiction over tonnage tax cases, then

the language plainly is superfluous—a construction to be avoided under the ordinary rules of statutory construction.

Kohlsaat v. Murphy, 96 U.S. 153;

United States v. Andrews Co., 15 Ct. Cust. Appls., 412.

To hold that the District Court does not have jurisdiction is to render useless and meaningless these provisions of the Act of 1911. They are a positive act of Congress, there could be no mistaking the intent of Congress, no possible confusion as to what was intended. The District Court was to have jurisdiction. As against that, there is only one decision of the Circuit Court where the Court itself raised the issue and decided adversely to jurisdiction without considering the situation the Act of 1884 sought to remedy.

Moreover, it must now be considered that since the language of the Act of 1911 (likewise carried into the codification of 1926, United States Code) is clear and unambiguous, the Courts have no right to give any meaning to such language other than that conveyed by the words, terms, or expression in which the legislative will is embodied.

Lewis v. United States, 92 U.S. 618-621;

Thornley v. United States, 113 U.S. 310-313;

Lake County v. Rollins, 130 U.S. 662, 670-671;

United States v. Goldenberg, 168 U.S. 95, 102-103;

Allen Steel Co. v. United States, 16 Ct. Cust. Appls. 26.

The term, revenue law, when used in connection with the jurisdiction of Courts of the United States,

includes tonnage taxes. *United States v. Hill*, 123 U.S. 681.

Moreover, it can further be seen that Congress did not intend at the time it passed the Act of 1884 to deprive Courts of jurisdiction in this case by the language it employed. Let us consider that language:

* * * and on all questions of interpretation growing out of the execution of laws relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final.

First, his findings are final not only as to *facts* but as to the *law* ("all questions of interpretation"); secondly, even when the collection of taxes is admittedly *erroneous* or *illegal* his decision is final.

Carried to its logical conclusion, if appellant's position is sound the Courts cannot look into his decision even if his interpretation of the law is erroneous or where admittedly the collection is or was *illegal*.

If such had been the Congressional intent, it would have been a simple matter to provide that the Courts were not to have jurisdiction. (Compare *Wilson & Co. v. United States*, 311 U.S. 104.)

In view of the legislative history, in view of the language employed, is it not more reasonable to say that Congress intended merely to remedy the confusion of having many separate parts of the Executive Branch handle what could more properly be handled by one man, with no thought of depriving the Courts of jurisdiction.

III. THE DIRECTOR'S ACTION WAS CAPRICIOUS, ARBITRARY AND UNJUST.

The brief of the appellant (pp. 41-42) intimates that if the Courts take jurisdiction of the subject matter, they would not have the ability to cope with the language and criteria involved in the determination of tonnage tax cases. This is indeed a novel proposition.

Such conflicting decisions as evidenced in this case and in the *Ontariolite* and *Rotterdam* cases, and the illogical bases of distinguishing the facts involved, are no great advertisement for the appellant's proposition. Moreover, in the *Santa Maria* case, on an identical voyage, the 2 cent rate was applied by the Collector at San Francisco.

Consideration of the statute shows how clearly arbitrary and capricious was the action of the Collector. The act (Act of August 5, 1909, c. 6, Sec. 36, 36 Stat. 111 [46 U.S.C. (1940) 121] provides:

A tonnage duty of 2 cents per ton not to exceed in the aggregate 10 cents per ton in any one year, is imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the coast of South America bordering on the Caribbean Sea, or Newfoundland, and a duty of 6 cents per ton, not to exceed 30 cents per ton per annum, is imposed at each entry on all vessels which shall be entered in any port of the United States from any other foreign port, not, however, to include vessels in distress or not engaged in trade.

The statute uses the word, "entry" from any foreign port. If such "entry" is from any port in the region from North America to the coast of South America bordering on the Caribbean Sea, the tonnage tax is 2 cents. In the instant case, the question arises, did it enter from Talara, Peru, or from Ioco (Vancouver), B. C.?

In order to determine the issue, consideration must be given to two questions:

(1) For what port was the vessel bound when it cleared from Talara, Peru, and

(2) Did the fact that the vessel sailed in ballast from Ioco for Port San Luis affect its status?

With respect to the first question:

The *Montebello* took a cargo of oil from Los Angeles and delivered part of it at Iquique, Valparaiso, and Antofagasta, Chile; then she sailed in ballast to Talara, Peru, where she loaded a cargo of oil for Ioco, B. C., sailed there and discharged completely and then cleared for Port San Luis.

There seems no more logical reason to assume that the voyage started at Talara, than at any of the points in Chile, or even in Los Angeles.

If a vessel touches incidentally at a foreign intermediate port, in order to obtain ship's stores, bunkers, etc., appellee recognizes that it is not entering from that port. But where the vessel actually enters and clears, it must be considered as entering from that port.

In Treasury Decision No. 11949, the question related to tonnage dues on vessels from Germany and England. If the vessels entered from Germany they were entitled to exemption, but not if they entered from England. In that case the vessels leaving German ports in ballast, proceeded to Shields, England, for bunker coal to be used as fuel during the voyage. Some vessels actually entered and cleared, while others did not. The Bureau of Navigation, on an opinion from the Attorney General, held:

* * * that a vessel touching as aforesaid at an intermediate port at which it neither enters nor clears, and which touching is a mere incident of the voyage, will not be deprived of the exemption derived from sailing from a port in Germany, such being its port of departure.

However, a contrary view was indicated if the vessel actually entered and cleared. See also Treasury Decision 10379.

In 25 Op. Atty. Gen. 157, it was ruled that if a vessel discharged all its cargo at Guantanamo, Cuba, and then proceeded to the United States, it was to be considered as coming from Guantanamo.

The foregoing dispels the fear voiced by the appellant (Brief, pp. 44-45) that the purpose of the law would be defeated by the adoption of the last port doctrine. It is obvious that incidental touching at 2 cent rate ports would not afford such vessels the benefit of a 2 cent rate. It can hardly be considered an incidental touching where the vessel unloads its entire cargo.

A case also somewhat in point is that of *The African Prince* (D.C. Mass., 1914), 212 Fed. 552. In that case the law involved was a quarantine law requiring that a health certificate from a United States official be obtained at the port of departure by a vessel at a foreign port "clearing for any port or place in the United States." The record showed that the vessel, after obtaining such a certificate, departed from Yokohama for Kobe, where it remained ten hours, although none of the crew, passengers or merchandise was landed, and then cleared for Mojii, without obtaining a health certificate. Prior to clearance from Mojii, the certificate was obtained. She visited several other ports from which she obtained certificates, and finally came to the United States. The Government contended that the word "clearing" in the statute means "sailing from" or "leaving" a foreign port, and that the words "for the United States" meant setting out with the United States as her ultimate destination, even though it may be intended to touch at intermediate ports.

The Court held that the term "clearing" should be used in the technical significance in which the term is used in our laws and that the vessel "cleared" for Mojii—that the vessel did not "clear for the United States" until it "cleared" at the last port of departure prior to reaching the United States.

A reference to that case makes it clear that a vessel "enters" from that foreign port from which she last "cleared". In other words, the *Montebello*, in order

to discharge her cargo, or transact any other trading activity at Ioco, would have had to “enter” and “clear” at the custom house. Then at the time of clearance she would have “cleared” for Port San Luis.

In regard to a tanker such as the *Montebello*, there is no such thing as a voyage—other than that the lading and discharge of a cargo constitutes a voyage. The tanker keeps on going in a circle of the oil ports, until repairs force a lay-off. The last port of discharge is the port from which it enters.

Appellee cited supra the *Ontariolite* and *Rotterdam* cases. (R. 24-26; 27-29; Fdgs. XIX, XX.) Except that those vessels are foreign owned, the facts are analogous—in the case of the former they are identical. In that case the Director states:

From the information before the Bureau, it appears that your office is of the opinion that this vessel is in regular trade with Port San Luis, and that when she left Talara, Peru, on the voyage in question, her ultimate destination was Los Angeles, California, via Vancouver, B.C.

The application of the owner of the vessel in question indicates that the *Ontariolite*, in the case under consideration, loaded a cargo at Talara, Peru, destined for discharge at Vancouver, B.C., Canada; that all the cargo laden on board at Talara, Peru, was discharged in Canada; and that the vessel proceeded in ballast to Port San Luis to load a full cargo of crude oil for discharge at Ioco, B.C., Canada. (R. 24-25.)

There the Collector contended for the very thing that the Director holds in the instant case, but the Collector was reversed in that case.

The *Santa Maria* case is also identical (Fdg. XXI). Also in that case the only point of difference is the fact that that vessel was of foreign registry.

If Talara, Peru, was not the port wherein the voyage started in the case of those vessels, it is not the beginning of the voyage in the instant case.

To uphold the Director's decision in this case is to uphold a patent discrimination in favor of foreign flag vessels.

With respect to the second question, *supra*:

The fact that a vessel arrives in ballast is of no moment. (See the cases of the *Ontariolite*, *Rotterdam* and *Santa Maria*.)

In 25 Op. Atty. Gen. 157, the question was whether a vessel coming from the Guantanamo naval base in ballast was exempt from tonnage taxes. The Attorney General held that it made no difference whether it came in ballast or with freight picked up at that port—it was to be considered as entering from that port.

We cannot concede that the Master's statement on entry should be binding on the vessel in this instance. Here the master had to show Talara, Peru, because the Collector refused to accept entry showing Vancouver, B.C. (Fdg. XII). As is pointed out in appellant's brief, note 28, a vessel is denied clearance until the prescribed amount is paid. Likewise, insistence of

the master in showing Vancouver, B.C., as the port from which he entered would subject his vessel to seizure as well as place him in jeopardy.

The Government cannot deny that the Collector will refuse to accept an entry or, if accepted, will subject a vessel to forfeiture, if in his opinion any statements of fact on entry are contrary to his ideas of what the facts should be. Under such circumstances the master of the vessel has no recourse.

The history of the *Ontariolite* and *Rotterdam* cases indicates that the Collector was not satisfied with the interpretation of the tonnage tax statute. Thus he exacted excessive tonnage taxes in those cases, and was reversed. How many other reversals took place we do not know. Whether the form of the entry convinced the Director in this case, we do not know, as it is unimportant to a decision herein.

The main thing is that there is not now, and never has been a long continued administrative practice which has been in any way uniform.

Furthermore, the statements in the entry did not influence the Collector as claimed by the appellant. That the Collector did not rely on the master's statement on entry is seen by the Collector's own admission, in his letter of May 9, 1941 (R. 19):

“Inquiry of Captain Andreasen, the Master, at time of entry developed that on October 23, 1940.

* * *”

If the Collector had relied on the Master's statement, why was any inquiry necessary? Moreover the

Captain was not permitted to make an entry showing entry from Vancouver.

CONCLUSION.

It is respectfully submitted that the judgment below should be affirmed.

Dated, Los Angeles, California,
May 9, 1945.

WALTER I. CARPENETI,
Attorney for Appellee.

No. 10931

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM JENNINGS BRYAN, JR., individually and as
Collector of Customs for the Port of Los Angeles,
Customs Collection, District No. 27,

Appellant.

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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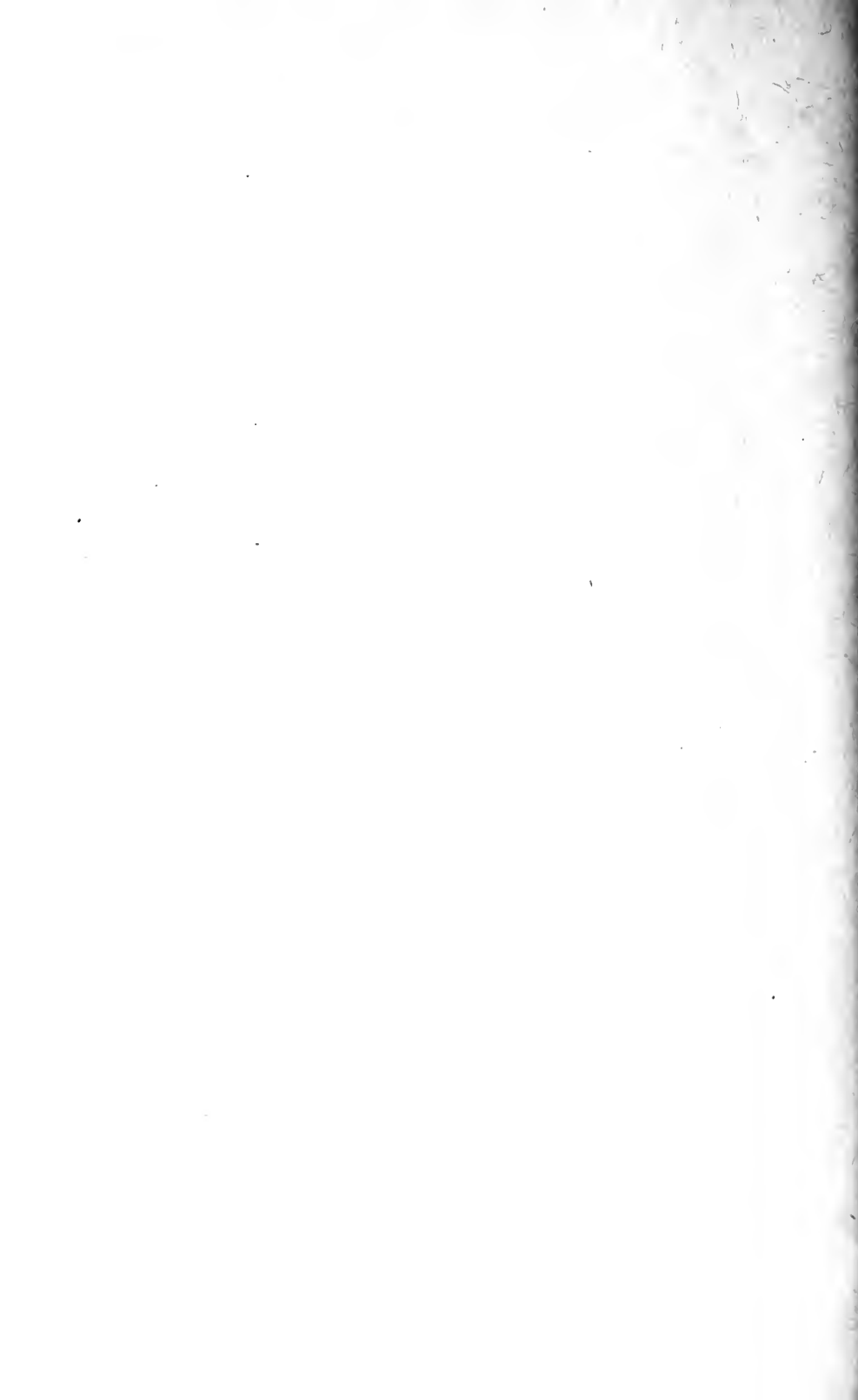
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IN THE

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Collector of Customs for the Port of Los Angeles,
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Appellant.

vs.

UNION OIL COMPANY OF CALIFORNIA, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

The Contentions of the Parties.

In the light of appellee's brief it appears that the basic question presented on this appeal is whether, after making an unprotested payment of the tonnage tax at the rate demanded by the collector and exhausting its administrative appeal to the Director, appellee, through the expedient of attempting to proceed against the collector individually in a common law action brought on analogy to *De Lima v. Bidwell*, 182 U. S. 1, 176 (1902), may escape the binding effect given the Director's decision by the Act of 1884.

Since the amount involved is only \$204.28 and there is no diversity of citizenship, appellee's only remedy in the

federal courts would be by suit against the United States under the Tucker Act unless this action may be maintained against the collector individually under section 24(5) of the Judicial Code (28 U. S. C. 41(5)). It is common ground to appellant and appellee that section 25(5) does grant the district court jurisdiction of all cases arising in connection with revenue from tonnage and it has accordingly never been disputed that the district court properly took jurisdiction of this action. It is equally common ground that within the narrow limits of the rule in *De Lima v. Bidwell*, *supra*; cf. *United States v. Lee*, 106 U. S. 196 (1882), a collector may in certain circumstances be held individually liable in a common law action (Opening Br. 16-17; Appellee's Br. 4). Appellant denies, however, the contention of appellee that the facts of this case bring it within the ambit of the rule in *De Lima's* case. Appellant further denies appellee's contention that the courts have jurisdiction to examine *de novo* the decisions of the Director in suits under section 24(5) of the Judicial Code. Appellant submits that whether in a suit under the Tucker Act or in a suit against the collector individually under section 24(5), the plain language of section 3 of the Act of July 5, 1884, c. 221, 23 Stat. 119, as amended (46 U. S. C. 3), makes the Director's decisions final. Secondly, appellant submits that in any event the Director's decision correctly applies the tonnage statute to the case at bar.

ARGUMENT.

I.

An Action Against the Collector Individually Will Not Lie in the Circumstances of This Case.

Since the \$204.28 involved was paid to the collector without protest and by him paid over to the Treasury as required by 19 U. S. C. 1512, it appears to be conceded that appellee must proceed by suit against United States under the Tucker Act unless the defendant collector exceeded his jurisdiction or was guilty of a personal wrong in receiving the payment. Appellant submits that neither situation is presented here and that appellee, although claiming that it brings this action under the rule in *De Lima v. Bidwell*, has not even attempted to bring this case within the facts of that case and the other cases upon which it relies (Br. 4-7).

In *De Lima v. Bidwell* the question presented for decision was whether, after the cession of Puerto Rico to the United States, sugars brought into the port of New York from that island were dutiable under the tariff acts as imports. The plaintiff paid the duties to the collector under protest and, without attempting to appeal to the Board of General Appraisers, brought suit against the collector individually. The Customs Administration Act, 1890, had provided that collectors should not be liable for "the collection of any dues, charges or duties on or on account of any such merchandise" or for any other matter which the importer might bring before the Board of General Appraisers. The Government argued that the statute thereby prohibited all actions against the collector individually. The Supreme Court, however, referred to *In re*

Fassett, 142 U. S. 479 (1892), and stated (182 U. S. at 176):

“We think the decision in the *Fassett* case is conclusive to the effect that, if the question be whether the sugars were imported or not, such question could not be raised before the Board of General Appraisers; and that whether they were imported merchandise for the reasons given in the *Fassett* case, that a vessel is not an importable article, or because the merchandise was not brought from a foreign country, is immaterial. In either case the article is not *imported*.”

It discussed the provisions of the Customs Administration Act and concluded (182 U. S. at 177):

“If the position of the Government be correct, the plaintiff would be remediless; and if a collector should seize and hold for duties goods brought from New Orleans, or any other concededly domestic port, to New York, there would be no method of testing his right to make such seizure. It is hardly possible that the owner could be placed in this position.”

Turning to the cases holding that, where there was jurisdiction to impose duties and the controversy was only as to the rate and amount, suit would not lie against the collector, the Court examined them and continued (182 U. S. at 179):

“The criticism to be made upon the applicability of these cases is, that they dealt only with *imported merchandise* and with the duties collected thereon, and have no reference whatever to exactions made by a collector, under color of the revenue laws, upon goods which have never been imported at all. With respect to these the collector stands as if, under color of his office, he had seized a ship or its equipment or

any other article not comprehended within the scope of the tariff laws. Had the sugars involved in this case been admittedly imported, that is, brought into New York from a confessedly foreign country, and the question had arisen whether they were dutiable, or belonged to the free list, the case would have fallen within the Customs Administrative Act, since it would have turned upon a question of classification.”

It is at once plain that the present case does not in any respect resemble the *De Lima* case. The case at bar was not one where the collector exceeded his jurisdiction by demanding duties where none were due. The *Montebello* did not come from another port of the United States and so fall outside the tonnage tax statute and the jurisdiction of the Director under section 3 to interpret it. The controversy is solely as to the classification of the voyage and the rate of duties to be collected and accordingly falls squarely within the authority of the Director. Far from supporting appellee, the *De Lima* case is authority for appellant. But appellee urges (Br. 4, 7) that decisions in customs cases cannot be authority for tonnage tax cases because the statutes are not the same. It is submitted that where, as here, the statutes contain similar provisions inserted for similar purposes arising out of analogous situations, cases construing the effect of such statutes in customs matters provide the best possible guide in deciding the controversy.¹

¹Since the foundation of the Government there appeared to have been only three reported cases involving suits against the collector to recover tonnage taxes: *Ripley v. Gelston*, 9 Johns, 201 (1812, N. Y. Sup. Ct.); *North German Lloyd S.S. Co. v. Hedden*, 43 Fed. 17 (1890, C. C. N. J.); *Laidlaw v. Abraham*, 43 Fed. 297 (1890, C. C. Ore.).

Cases like *De Lima v. Bidwell* and the others cited by appellee turn on the circumstances that since the action of the collector exceeded his jurisdiction he could make no claim to have acted officially. His acts were therefore deemed to constitute an individual wrong for which he was individually liable. Thus in *Ogden v. Maxwell*, 18 Fed. Cas. No. 10,458 (1855, C. C. N. Y.), the controversy was not as to the classification or rate but as to the jurisdiction to collect at all. The statute authorized the collection of a fee of 20 cents for a permit to land baggage from vessels. The collector exceeded his jurisdiction by collecting a 20-cent fee for each five passengers landed although issuing only one permit for each vessel. In *Border Line Transportation Co. v. Haas*, 128 F. (2d) 192 (1942, C. C. A. 9), the controversy was exclusively as to the jurisdiction of the collector to collect any fee under the statute, not as to the rate or amount collectible. So again in *Consulich Line v. Elting*, 40 F. (2d) 220 (1930, C. C. A. 2), the controversy was as to the jurisdiction under the statute to impose multiple fines and not as to the classification and rate to be used in computing the amount of fines admittedly due.

Moreover, as already pointed out (Opening Br. 18), some notice or protest is necessary to hold the collector individually while it appears from the stipulation of facts that appellee's payment of the tonnage taxes was made voluntarily and without protest with the intention of taking its administrative appeal to the Director. Appellee (Br. 6-7) and the court below [Opinion, R. 55] suggest that the payment to the collector was under duress and compulsion and that therefore protest was not needed. They argue that the filing of the Master's oath on entry showing the voyage to be from Talara via Vancouver was

under compulsion in that had the Master refused the vessel might have been subjected to forfeiture. They imply that the payment in accordance with the oath was itself therefore under duress and dispensed with the necessity of protest.² It is submitted that this contention is devoid of merit. It does not appear that any penalty whatever is imposed for the filing in good faith of an oath containing a conclusion of fact as to the character of the voyage which is later determined to be erroneous. Even failure to enter a vessel at all entails no liability of the vessel to forfeiture but only subjects the Master to liability to a fine (19 U. S. C. 1436). Since it involves a matter of judgment the oath is not perjured. But if it could be assumed that the filing of the oath was under compulsion, still it would not follow that payment of the tax was in consequence of duress. As previously indicated (Opening Br. 37) the procedure for compelling payment of tonnage

²Appellee's assertion, that where payment is under compulsion protest is unnecessary, is not supported by the decided cases. Appellee's chief reliance is the dictum of the Supreme Court in *Elliott v. Swartout*, 10 Pet. 137, 158 (1836), respecting *Ripley v. Gelston*. But earlier in its opinion the Supreme Court had already observed (p. 157): "The case of *Ripley v. Gelston*, 9 Johns. 201, was a suit against a collector to recover back a sum of money demanded by him for the clearance of a vessel. The plaintiff objected to the payment, as being illegal, but paid it, for the purpose of obtaining the clearance, and the money had been paid by the collector into the branch bank, to the credit of the treasurer. The defense was put on the ground that the money had been paid over, but this was held insufficient." (Italics supplied.) *Ogden v. Maxwell*, 18 Fed. Cas. No. 10,458 (1855, C. C. N. Y.), appellee's only other authority, involved the absence of a formal written protest as required by the Act of 1845 in some cases. It appears there had been some sort of notice or protest although not in writing. In the present case of the *Montebello* there was no notice or objection whatsoever.

tax is by denying clearance to the vessel. *E.g.*, *Ripley v. Gelston*, 9 Johns 201, (1812, N. Y. Sup. Ct.). Where the vessel does not seek to clear, the Government libels her for the amount of the tax. *E.g.*, *The Alta*, 148 Fed. 663 (1906, C. C. A. 9.) Liability to such an action does not constitute duress for the owner has every opportunity in the litigation to assert any defenses to payment.

The stipulation of facts [R. 41] and the court's findings [R. 63] show plainly that payment was not made under any form of compulsion whatever. The law is firmly settled that "unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary." *Cunard S. S. Co. v. Elting*, 97 F. (2d) 373, 377 (1938, C. C. A. 2). In the case at bar as in *United States v. Cuba Mail S. S. Co.*, 200 U. S. 488, 494 (1906), "There was no claim to the collector of the port from whom the clearances were asked that defendant in error was acting under the restraint of law and yielding only to enable his ships to depart to their destination." On the contrary it is obvious that payment was made voluntarily with the intention of perfecting administrative appeal to the Director for refund in accordance with the regulations. Appellant submits that appellee thereby recognized the collector for the mere ministerial officer which he is in fact and left him no alternative but to accept appellee's payment and forward it to his superior, the Director, with the papers relating to appellee's administrative appeal. In such circumstances it would be contrary to equity and good conscience to hold the defendant collector individually liable at common law if on judicial review the decision of his superior, the Director, is found to have been arbitrary or capricious.

II.

The District Court Has Jurisdiction of an Action Against the Collector But Has No Jurisdiction in Such an Action to Examine De Novo the Director's Decisions.

Appellee contends (Br. 17-19), that not only does section 24(5) of the Judicial Code (23 U. S. C. 41 (5)) confer jurisdiction of the action against the collector individually but by necessary implication also restricts *pro tanto* the effect of section 3 of the Act of July 5, 1884, c. 221, 23 Stat. 119, as amended (46 U. S. C. 3), and authorizes the district court to examine *de novo* the decisions of the Director and substitute its own findings and interpretation despite the finality accorded the administrative decisions by the express language of that act. Appellee's argument proceeds by confusing the question of the court's jurisdiction of the action under section 24(5) with that of the limitations placed by the Act of 1884 upon the court's authority to exercise that jurisdiction to review decisions of the Director. Appellee seeks to conclude from the fact that the Government has never in this or in earlier similar proceedings denied the court's jurisdiction of the action that until now it has conceded the court's right to review the Director's decisions in an action under section 24(5). Thus appellee insists (Br. 9) with respect to *North German Lloyd S. S. Co. v. Hedden*, 43 Fed. 17 (1890, C. C. N. J.), that, "The court raised the question of jurisdiction, *sua sponte*, the court remarking as to defendant's counsel's failure to even brief the question of jurisdiction." And similarly argues (Br. 19) that if the Act of 1884 had been intended to restrict judicial review Congress would have found it "a simple matter to provide that the courts were not to have jurisdiction."

It is submitted that the distinction between the two questions confused by appellee is elementary; that while absence of authority to review an administrative decision is often characterized as a lack of jurisdiction it need not be so regarded and that the jurisdiction of actions involving tonnage conferred by section 24(5) has no more effect upon the restriction on the court's authority by section 3 of the Act of 1884 than has the jurisdiction of suits against the United States conferred by the Tucker Act. There is nothing inconsistent in the course followed by the Government. As pointed out by appellant (Opening Br. 11, 30-32), the court in the *North German Lloyd* case expressly referred to the Government's position that the Supreme Court case of *Cary v. Curtis*, 3 How. 236 (1845), had established the validity of statutes making administrative decisions final and binding on the courts and that it was accordingly unnecessary to brief the question although the shipping companies were vigorously urging that the statute was invalid. In such circumstances it is at least disingenuous for appellee to attempt to imply that the court's consideration of the effect of the Act of 1884 was *sua sponte*. Never from the beginning has the Government acquiesced in appellee's apparent view that the courts may ignore the statutory provision for administrative finality and substitute their own interpretation for the Director's decisions. The Government's practice of not treating the matter as a jurisdictional defect is understandable. As a restriction on the manner in which jurisdiction may be exercised it need not be so regarded. The situation is no different than that where parties to a private contract stipulate that the decisions of an arbitrator shall be final. Whatever confusion may have existed at one time, it is now settled that such arbitration clauses do not oust the court of jurisdiction but, on the contrary, merely limit the

scope of the court's examination of the case and are valid and binding upon the courts and parties alike.

There is no greater merit in appellee's suggestion that Congress might, as it has in recent tax and veterans' legislation, expressly deny the courts all jurisdiction of such cases. In arbitration and dispute clauses of private contracts, where the parties lack the power thus to deny jurisdiction to the courts, no such formula of words has ever been found necessary. This style of legislative draftsmanship is of recent origin and we know of no principle which requires the draftsmen of 1884 to anticipate the linguistic preferences of a half century later. The plain, express language of section 3 of the Act of 1884 makes the decisions of the Director final and Congress, no more than the parties to private agreements for arbitration, had any need to say more. There is no provision anywhere allowing an appeal from the final decision of the Director to the courts. *Cf. Cruchfield v. United States*, 142 F. (2d) 170, 173 (1943, C. C. A. 9).

Nor is it any argument to say, as appellee implies (Br. 15), that should the Director fall into error the taxpayer will have been denied a legal remedy. A legal remedy need not be a judicial remedy (Opening Br. 32) and for the purpose of appeal from the action of the collector, section 3 of the Act of 1884 makes the Director the competent legal tribunal. If the courts were authorized to review his decision and the highest appellate court should commit error, there would equally be no legal remedy in appellee's sense. But the object of such statutory provisions and of similar clauses in the contracts of private parties is to confine the decision of technical questions to persons possessing special skill and experience in order to limit the field of controversy and the expense of litigation. The purpose is to relieve judges,

who are specialists skilled in legal matters, of endless technical details of tonnage admeasurement and the assessment of tonnage taxation as to which they are not skilled. While the present controversy over \$200 may seem technical, if the learned district judge is correct in his interpretation of the Act of 1884, the courts may be equally required to review and determine the much more technical question of the correct tonnage admeasurement of any ship or motorboat. The same provision of the Act of 1884 is applicable and the same result must be reached.

Long before section 3 of the Act of 1884, Congress had adopted the practice of leaving such technical questions to final decision by the skilled administrative officers involved. Provisions similar to that of section 3 are not unique. Besides the Act of 1839 and R. S. 2930 referred to in appellant's opening brief, an instance, also familiar to the draftsmen of 1884, where language of even more general character was held to restrict judicial review is furnished by R. S. 3264, providing for distillery surveys for tax purposes. That section, since repealed, directed collectors of internal revenue or their deputies to make surveys of distillery plants and fix their production capacity. The capacity thus determined was the basis for computing the tax liability of the distiller and was conclusive except for review by appeal to the Commissioner of Internal Revenue. *Collector v. Beggs*, 17 Wall. 182, 191 (1872); *Pahlman v. Collector*, 20 Wall. 189, 197, 201 (1873). The question at bar differs in no important particular from that of the distillery survey. The voyage as determined by the Director furnishes the basis for computing the vessel's tax liability exactly as the capacity determined by the Commissioner furnished the basis for computing that of the distillery.

III.

The Director's Decision in the Case of the Montebello Was Not Capricious or Inconsistent and Was Conclusive on the Court.

Far from being capricious and arbitrary the Director's decision in the case of the *Montebello* is based upon the only workable application of the tonnage statute in the situation which appellee concedes to exist. As appellee observes (Br. 24), in regard to a tanker trading as did the *Montebello*, "The tanker keeps going in a circle of the oil ports until repairs force a lay-off." And (Br. 21), "There seems no more logical reason to assume that the voyage started at Talara, than at any of the points in Chili, or even Los Angeles." It does not follow, however, as appellee contends (Br. 23-24), that there is no such thing for the vessel as a voyage out and home in the sense contemplated by the Congress in the tonnage tax statute, or that the last previous port of discharge is the only port from which a vessel may be deemed to enter. On the contrary, it is submitted that, since the whole voyage is circular, when the vessel enters an American port she enters not alone from her last port of call but from every port in the circle of her voyage.³ Some of these ports may be American and as to them no tax is due. Some may be foreign North or Central American ports within the short-voyage limits and as such taxable

³This principle is recognized in 19 U. S. C. 1434, relating to the entry of vessels where it is provided that "the master of a vessel of the United States arriving in the United States from a foreign port or place shall * * * make formal entry of the vessel at the customhouse by producing and depositing with the collector the vessel's crew list, its register, or document in lieu thereof, the clearance and bills of health issued to the vessel at the foreign *port or ports from which it arrived*, together with the original and one copy of the manifest." (Italics supplied.)

at the 2-cent rate. Some may be foreign ports in the long-voyage limits and taxable at the 6-cent rate. In every case it is necessary to consider the port of origin of the entire voyage and the port of its ultimate destination as well as every other port of call and the vessel should pay a single tax calculated at the highest rate applicable to any of the ports with which she has traded on her voyage. As was pointed out to the Congress in 1887 (see Opening Br. 50), this principle of the highest single rate is the inevitable consequence of the statutory scheme and has now been sanctioned by the tacit approval of Congress for over fifty years.

Appellee's argument (Br. 24) that the decisions in the *Ontariolite* and *Rotterdam* cases are inconsistent with the Director's decision in the *Montebello* case and show it to be arbitrary and capricious is purely meritricious.⁴ They are in complete accord with the principle just stated. The voyages in those cases were not circular, like that of the *Montebello* here. They were simply out and back. Thus the *Ontariolite*, a British vessel, entered Port San Luis in ballast from Vancouver; loaded a cargo and returned to the port of Ioco at the same place. The Director correctly held (R. 24-26) that this constituted an independent voyage from Vancouver to Port San Luis for cargo and return, did not form part of the previous voyage to South American ports and back, and was

⁴The case of the *Santa Maria*, referred to by appellee (Br. 25; cf. Fdg. XXIII, R. 66) as identical with that of the *Montebello*, is without significance here. It was never decided by the Director under 46 U. S. C. 3 since the collector accepted the lower rate and no provision is made to submit for review by the Director the cases which are favorable to the taxpayer. (See Opening Br. 37, note 28). It is accordingly no evidence of the administrative interpretation of the Director whose interpretation is alone made binding by the statute.

accordingly taxable at the 2-cent rate. Similarly in the *Rotterdam* the voyage plainly was not circular but was a tramping operation from port to port, first one way, then another. The vessel, a Dutch tanker, had proceeded to Talara where she took cargo and after transiting the Panama Canal discharged at various Central American ports on the Atlantic side. She then cleared Cutuco, El Salvador, for Bowling, Scotland, via San Pedro and again transited the canal to the Pacific. She entered at San Pedro in ballast, took her cargo for Bowling and returned through the canal to the Atlantic. The case did not reach the Director but was decided by H. C. Shephard, Acting Director, who held [R. 27-29] that in the circumstances her trip from the Caribbean to the Pacific to take cargo at San Pedro and back to the Caribbean and on to Scotland was an independent voyage, "the port of origin of which was Cutuco and the port of ultimate destination of which was Bowling via your port [of San Pedro]." The case is a close one which might have been decided the other way but, like the *Ontariolite*, it is an entry from what was essentially an independent voyage out and back and is perfectly consistent with the decision in the *Montebello* case.⁵ If the *Montebello* had

⁵Since the Acting Director's decision was in favor of the taxpayer the case did not reach the Director for rehearing and we do not know whether he would have affirmed the decision of his subordinate or reinstated the action of the collector. The case indicates the complexities of the question of whether a vessel enters from a voyage trading in the long-voyage limits or only within the short-voyage limits. It illustrates the burden upon the time of the courts and the increased expense to the shipping interests and to the Government alike which would result if decision of technical questions involving insignificant amounts had been committed to the courts rather than to administrative experts.

come from Vancouver to Port San Luis to take cargo and return to Vancouver, it also would have been taxable at the 2-cent rate. Instead, however, Port San Luis marked the end of its voyage after which it changed its document from register for the foreign trade to license and enrollment for the untaxed coasting trade.

Appellee (Br. 23-24), echoing the court below [R. 54-55], attempts to escape the difficulty in the determination of the applicable rate by interpreting the statute as meaning that, regardless of whether the vessel is in fact trading in the long-voyage limits, she is to be deemed as entering only from whatever port she last cleared. The appealing simplicity of this construction must be recognized, but it flies in the face of the rule that even what appears to be a literal interpretation of a statute is not permissible where it leads to a result which Congress could not have intended. *Cf. United States v. 21 pounds of Platinum*, 147 F. (2d) 78, 83 (1945, C. C. A. 4). The legislative history of the tonnage statute (see Opening Br. 46-50) shows plainly the intention of Congress to make the rate of tonnage tax vary with the character of the voyage: Vessels trading in the short-voyage limits are to pay but two cents while those trading beyond pay six. Simplicity of administration is no reason for adopting the inequitable course of exempting from the 6-cent rate a vessel on a circular voyage extending into the long-voyage limits while imposing it on the vessel which trades directly with a long-voyage port.

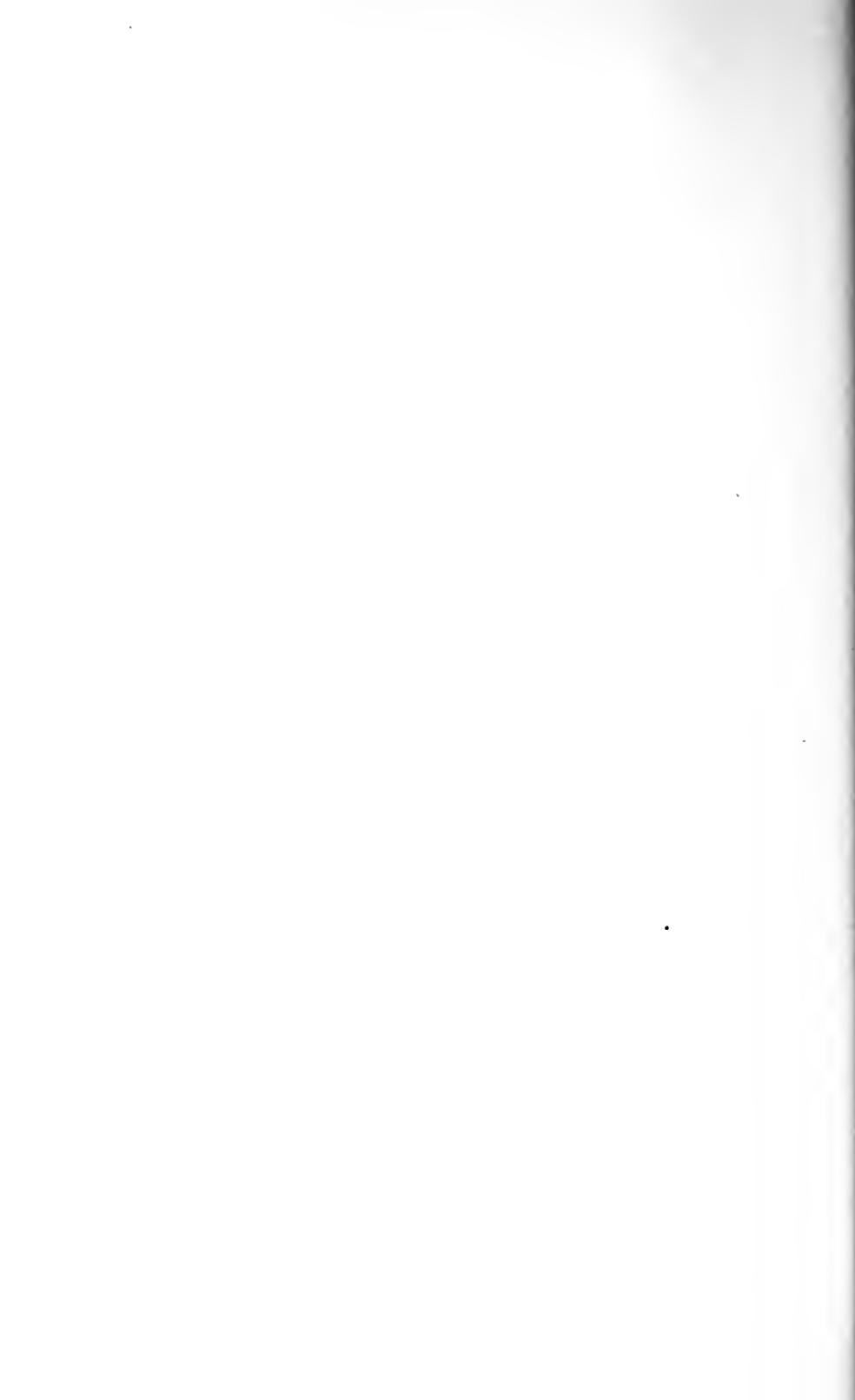
Conclusion.

It is therefore submitted that in the circumstances no action will lie against the collector individually, that the decision of the Director is final and conclusive on the courts, and that in any event the tonnage tax was correctly assessed at the 6-cent rate. Accordingly appellant respectfully submits that the case should be remanded to the district court with instructions to dismiss appellee's complaint.

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June 1945.



No. 10,931

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM JENNINGS BRYAN, JR., Individually
and as Collector of Customs for the Port
of Los Angeles, Customs Collections Dis-
trict No. 27,

Appellant,

vs.

UNION OIL COMPANY OF CALIFORNIA,
a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

SUPPLEMENTAL BRIEF FOR APPELLANT.

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Appellee.

Upon Appeal from the District Court of the United States for the
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SUPPLEMENTAL BRIEF FOR APPELLANT.

By order, entered January 22, 1946, the Court directed the parties herein to file supplemental briefs addressed to the question of whether or not the district court had jurisdiction in view of the fact that since *Erie R.R. Co. v. Tompkins*, 304 U. S. 64 (1938), any personal liability of the appellant collector must be created by California and not by federal law.

SUMMARY OF ARGUMENT.

Appellee appears to concede that, despite the allegations of the complaint, this action is not brought against the appellant collector in his official capacity but against him individually and solely on account of the commission of what it asserts is his private and personal wrong at common law. Under the *Erie* rule such liability must now be found in the law of California and not in the exceptional federal rule of *De Lima v. Bidwell*, 182 U. S. 1, 174 (1901), which previous to the *Erie* case was applicable under *Downes v. Bidwell*, 182 U. S. 244, 248 (1901).

Since, however, California law does not impose liability on a revenue officer who collects a tax in good faith and pays it over to the Treasury, there can be no occasion in the case at bar to decide any question which depends upon the construction to be given a federal statute. There can, therefore, be no jurisdiction in the district court.

When this Court discovers the absence of federal jurisdiction in the district court its duty under section 37 of the Judicial Code (28 U.S.C. 80) is to direct the district court to dismiss the action.

I.

SINCE ERIE R. R. CO v. TOMPKINS THERE CAN BE NO FEDERAL JURISDICTION OF AN ACTION AGAINST APPELLANT UNLESS THE QUESTION OF HIS LIABILITY REQUIRES DECISION OF A CONTROVERSY REGARDING THE INTERPRETATION OF A FEDERAL STATUTE.

It is elementary that a suit against a federal officer in his official capacity is a suit against the United States itself and is not maintainable in the absence of statutory authorization. No authority exists for suit against a Collector of Customs officially but only for suit against the United States under the Tucker Act in the district court or the Court of Claims. *Rankin-Gilmour & Co. v. Newton*, 270 Fed. 332 (1920, S.D. N.Y.); cf. *Dooley v. United States*, 182 U. S. 222, 226 (1901). And then only after exhaustion of any applicable administrative remedies. Cf. *Patchogue-Plymouth Mill Corp. v. Durling*, 101 F. (2d) 41 (1939, C.C.A. 2); see Appt's. Br. 10-14. Indeed, appellee (Br. 4-5) appears to concede that, despite the allegations against the appellant collector in his official capacity which are found in its complaint, this suit is not brought against the collector as an official under federal law, but solely against him as an individual in his private capacity and on account of alleged personal wrongs done under color of office.¹

¹Compare, however, the views of Frank, Ct. J. in *Hammond-Knowlton v. United States*, 121 F. (2d) 192 (1941, C.C.A. 2), cert. den. 314 U.S. 694. It must be kept in mind that the two aspects of liability are distinct and subject to non-apposite procedures. *Toledo Ry. & Light Co. v. McMaken*, 17 F. Supp. 338, 346 (1926, N.D. Ohio).

But the *Erie* case declares that there is no federal law of tort applicable to such personal wrongs.² If then, as conceded by appellee, the liability of the appellant collector is founded solely upon some unjustified personal and tortious invasion of appellee's rights by the appellant, the source of that liability must be the law of California and not the exceptional federal rule of *De Lima v. Bidwell*, 182 U. S. 1, 174 (1901), upon which appellee states it relies. (Br. 5-6.)

Prior to the *Erie* case it had been settled by *Downes v. Bidwell*, 182 U. S. 244, 248 (1901), decided the same day as *De Lima's* case, that suits for personal wrongs, brought against the collector individually under the exceptional federal rule of *De Lima's* case, came within the original jurisdiction of the district court. In *Downes'* case the court held that the provisions which are now sections 24 (5) and 33 of the Judicial Code (28 U.S.C. 41(5) and 76) are *in pari materia* and should be construed together to give the district court original jurisdiction of cases, which, like the present, involve a suit against the collector in his private capacity for alleged personal wrongs done under color of his office. Said the Court (182 U. S. at 248):

The exception to the jurisdiction of the court is not well taken. By Rev. Stat. sec. 629, subdivision 4, the Circuit Courts are vested with jurisdiction "of all suits at law or equity arising under any act providing for a revenue from imports or tonnage," irrespective of the amount involved. This section should be construed in connection with

²*Standard Oil Co. v. United States*, decided February 14, 1946, by this Court.

sec. 643, which provides for the removal from state courts to Circuit Courts of the United States of suits against revenue officers "on account of any act done under color of his office, or of any such (revenue) law, or on account of any right, title or authority claimed by such officer or other person under any such law." Both these sections are taken from the act of March 2, 1833, c. 57, 4 Stat. 632, commonly known as the Force Bill, and are evidently intended to include all actions against customs officers acting under color of their office. While, as we have held in *De Lima v. Bidwell*, actions against the collector to recover back duties assessed upon non-importable property are not "customs cases" in the sense of the Administrative Act, they are, nevertheless, actions arising under an act to provide for a revenue from imports, in the sense of section 629, since they are for acts done by a collector under color of his office.

Since the *Erie* case, however, a contrary result has been reached in the case of judicial officers sued in their private capacities for alleged personal wrongs committed under color of office and *Downes'* case has been disregarded. *Viles v. Symes*, 129 F. (2d) 828, 831 (1942, C.C.A. 10), cert. den. 317 U. S. 633, 711. It would seem, indeed, that *Downes'* case is incompatible with the *Erie* rule, by which an alleged personal wrong done under color of office cannot of itself present a question arising under federal law and involving original jurisdiction of the district court.³ The *Erie* rule

³Cf. *Bell v. Hood*, 150 F. (2d) 96, 99 (1945, C.C.A. 9).

requires a plaintiff to establish *first*, that local law imposes liability upon the federal officer in the event that he in fact did violate the federal law, and only then, *second* that a question arising under the constitution and laws of the United States and involving their interpretation is presented.⁴ Accordingly, in the case at bar, unless appellee by pleading and proof shall establish a cause of action against the appellant collector in his individual capacity by California law there can be no federal jurisdiction.

II.

THE CASE AT BAR CANNOT REQUIRE THE DECISION OF A QUESTION REGARDING THE INTERPRETATION OF A FEDERAL STATUTE BECAUSE UNDER CALIFORNIA LAW APPELLANT IS IN NO EVENT PERSONALLY LIABLE.

Assuming, *arguendo*, appellee's contention that the decision of the Director of the Bureau of Marine Inspection and Navigation, rejecting appellee's protest against payment of the long-voyage rate, was contrary to the federal statute; assuming also that the appellant collector should have recognized the error of the decision and refused to obey his superior; still California law does not follow the exceptional rule of

⁴*Rankin-Gilmour & Co. v. Newton*, 270 Fed. 332 (1920, S.D. N.Y.); *Davidson v. Rafferty*, 34 F. (2d) 700, 702 (1929, E.D. N.Y.), *aff'd* 39 F. (2d) p. 1022; *Johnson v. Thomas*, 16 F. Supp. 1013, 1018 (1936, N.D. Tex.); *cf. Bell v. Hood*, *supra*. Accordingly, in a case where no question under federal law is involved, the absence of any defendant sued in an official capacity requires dismissal. *Thomason v. Works Projects Administration*, 138 F. (2d) 342 (1943, C.C.A. 9).

De Lima's case and does not impose liability on the appellant collector if he does obey in such circumstances. In California the historic rule of *Cary v. Curtis*, 3 How. 236 (1845), is still the law. By *Hartford Fire Ins. Co. v. Jordan*, 168 Cal. 270, 142 Pac. 839 (1914); *Sheehan v. Board of Police Commissioners*, 188 Cal. 525, 532, 206 Pac. 70 (1922), and *Spencer v. Los Angeles*, 180 Cal. 103, 116, 179 Pac. 163 (1919), it is settled and established that where, under duress of law, a taxpayer pays a revenue officer who is required to pay over the money to the Treasurer, no suit will lie against the officer personally. Performance of the statutory duty to pay over is presumed and the retention of the money by the officer must be expressly pleaded. *Craig v. Boone*, 146 Cal. 718, 81 Pac. 22 (1905). The California rule is well summarized in *Phelan v. San Francisco*, 120 Cal. 1, 5, 52 Pac. 38 (1898), where the Court said:

It was the duty of the tax collector, however, to pay this money into the treasury immediately upon its receipt, irrespective of the fact that it was paid to him under protest * * * and he was not absolved from this obligation by reason of the protest and notice of the plaintiff. Having paid the money into the treasury in obedience to this official duty, it would violate all principles of justice to hold him individually liable to the plaintiff therefor, upon the ground that he had refused to follow the plaintiff's directions to disregard his official obligation.

See also *Welsbach Co. v. California*, 206 Cal. 556, 561, 275 Pac. 436 (1929); see 21 *Cal. Jur.*, pp. 903-904.

But not only was appellant's payment over a complete defense under California law, appellee has also failed to plead or prove either duress or protest. The complaint herein (R. 4-5) alleges neither duress nor protest. The record is as barren as the pleadings of any offered proof in this regard. Although in brief and argument appellee seeks to make much of the fact that it might have been put under duress by the denial of clearance or by the institution of proceedings for penalty against its shipmaster or for forfeiture against its vessel, this can avail nothing against the silence of the record.

Moreover, under California law there is no duress involved unless payment of the tax by the plaintiff will deprive him of the right to raise some defense as to the illegality of its imposition. As the Court observed in *Phelan v. San Francisco*, supra (120 Cal. at 5):

In order to constitute a payment under duress, there must be some coercion or compulsion which controls the conduct of the party making the payment—some threatened exercise of power or authority over his person or property, which can be avoided only by making the payment. If one pays an illegal demand with full knowledge of its illegality, his protest does not take from the payment its voluntary character, unless the payment is necessary in order to protect his person or property. The payment of a tax to prevent a threatened sale of real estate is not compulsory, unless the conveyance by the officer will have the effect to deprive the owner of some defense to the

tax, or throw upon him the burden of showing its illegality.

Indeed, the law generally is that, where a taxpayer has another means of making his defense and asserting the illegality of the tax there is no duress. *Christ Church Hospital v. Philadelphia County*, 24 Pa. 229 (1855), error dismissed. 20 How. 26; *McGee v. Salem*, 149 Mass. 238, 21 N. E. 386 (1889); *Canfield Salt & Lumber Co. v. Manistee Twp.*, 100 Mich. 466, 59 N. W. 164 (1894).

In the case at bar appellee undeniably had the right to assert any claim of illegality open to it under the statutes as a defense to any penalty or forfeiture proceeding which might be commenced against its shipmaster or vessel. Moreover, it had available the course, which it actually chose, of making payment, taking its administrative appeal and, if unsuccessful on its appeal, of then bringing suit against the United States under the Tucker Act and there asserting any claim of illegality open to it under the statutes.⁵ It was not open to it under California law, however, to charge the appellant collector with individual wrong in obeying the mandates of his superiors and the injunction of the statutes.

In these circumstances appellee's pleading and proof fail under California law to make a case which required the district court to determine the correct in-

⁵*Social Security Board v. Niertko*, decided February 25, 1946, U.S.C. No. 318 (Slip Opinion, p. 8); *Estep v. United States*, decided February 4, 1946, U.S.C. No. 292 (Slip Opinion, p. 4).

terpretation of the federal revenue statutes referred to in the complaint. There is, therefore, no question "arising under any law providing for revenue from imports or tonnage" which could be presented and the district court plainly had no jurisdiction of the case.

III.

WHERE NO SUBSTANTIAL QUESTION OF FEDERAL LAW IS RAISED BY THE RECORD IT IS THE DUTY OF THIS COURT TO ORDER THE ACTION DISMISSED.

The failure of the parties to insist on the absence of general federal jurisdiction does not waive the want of original jurisdiction in the district court. Under section 37 of the Judicial Code (28 U.S.C. 80), it is the duty of this Court to order the dismissal of a suit at any time it may be discovered that it does not truly and substantially involve a dispute or controversy properly within the district court's jurisdiction. *Hare v. Birkenfield*, 181 Fed. 825 (1910, C.C.A. 9); *Royal Ins. Co. v. Stoddard*, 201 Fed. 915 (1912, C.C.A. 8).

In the case at bar the pleadings and proof having failed to show any liability of appellant to appellee under California law, no question of federal law is presented which can sustain the jurisdiction of the district court in the absence of diversity of citizen-

ship. It is, accordingly, the duty of this Court to remand the case with directions to dismiss.

Dated, March 14, 1946.

Respectfully submitted,

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